

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:  
REFCO, INC. et al.

Debtors.

JOSEPH MURPHY, WILLIAM M. SEXTON,  
DENNIS A. KLEJNA, GERALD SHERER,  
PHILIP SILVERMAN, RICHARD N.  
OUTRIDGE, TONE GRANT, LEO R.  
BREITMAN, NATHAN GANTCHER,  
DAVID V. HARKINS, SCOTT L. JAECKEL,  
THOMAS H. LEE, RONALD O'KELLEY,  
and SCOTT A. SCHOEN,

Plaintiffs,

v.

ALLIED WORLD ASSURANCE COMPANY  
(U.S.), INC. and ARCH INSURANCE  
COMPANY,

Defendants.

JOHN D. AGOGLIA, EDWIN L. COX,  
SUKHMEET DHILLON, THOMAS H.  
DITTMER, STEPHEN GRADY, THOMAS  
HACKL, ERIC G. LIPOFF, PETER  
MCCARTHY and FRANK MUTTERER,

Nominal Defendants.

Chapter 11  
Case No. 05-60006 (RDD)  
(Jointly Administered)

Adv. Proc. No. 08-01133 (RDD)

**DECLARATION OF JOHN H. EICKEMEYER IN SUPPORT OF  
ARCH INSURANCE COMPANY'S MOTION TO WITHDRAW  
THE REFERENCE TO THE BANKRUPTCY COURT**

I, John H. Eickemeyer, do hereby declare as follows under penalties of perjury pursuant  
to 28 U.S.C. § 1746:

1. I am counsel for Defendant Arch Insurance Company.

2. Attached as Exhibit A is a true and correct copy of excerpts of a transcript of hearing held on June 8, 2006, in the bankruptcy case *In re Refco, Inc.*, No. 05-60006 (Bankr. S.D.N.Y.).

3. Attached as Exhibit B is a true and correct copy of an order entered on February 20, 2007, in the case *Arch Insurance Co. v. Bennett et al.*, No. 600805/06 (N.Y. Sup. Ct.).

4. Attached as Exhibit C is a true and correct copy of the Opposition of Defendants Dennis Klejna, Joseph Murphy, William Sexton, Gerald Sherer and Philip Silverman to the Motion to Intervene of Arch Insurance Company filed in the adversary proceeding *Axis Reinsurance Co. v. Bennett et al.*, No. 07-01712 (Bankr. S.D.N.Y.).

5. Attached as Exhibit D is a true and correct copy of excerpts of the transcript of an August 30, 2007, hearing in the adversary proceeding *Axis Reinsurance Co. v. Bennett et al.*, No. 07-01712 (Bankr. S.D.N.Y.).

6. Attached as Exhibit E is a true and correct copy of Arch's first amended complaint in the action *Arch Insurance Company v. Agolia, et al.*, No. 08-600029 (N.Y. Sup. Ct.).

7. Attached as Exhibit F is a true and correct copy of the Stipulated Order for Entry of Judgment against Phillip C. Bennett entered between Arch and Bennett in the action *Arch Insurance Company v. Agolia, et al.*, No. 08-600029 (N.Y. Sup. Ct.).

8. Attached as Exhibit G is a true and correct copy of the Stipulation of Discontinuance with Prejudice entered between Arch and Santo C. Maggio in the action *Arch Insurance Company v. Agolia, et al.*, No. 08-600029 (N.Y. Sup. Ct.).

9. Attached as Exhibit H is a true and correct copy of the transcript of hearing on October 5, 2007, before Judge Koetl in the proceeding *Axis Reinsurance Co. v. Bennett et al.*, No. M-47 (S.D.N.Y.).

Date: April 29, 2008

/s/ John H. Eickemeyer  
John H. Eickemeyer

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:  
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THOMAS H. LEE, RONALD O'KELLEY,  
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Nominal Defendants.

Chapter 11  
Case No. 05-60006 (RDD)  
(Jointly Administered)

Adv. Proc. No. 08-01133 (RDD)

**CERTIFICATE OF SERVICE**

1. I, John H. Eickemeyer, hereby declare, pursuant to 28 U.S.C. 1746, under penalty of perjury, as follows:

2. On April 29, 2008, I caused a copy of the **DECLARATION OF JOHN H. EICKEMEYER IN SUPPORT OF ARCH INSURANCE COMPANY'S MOTION TO WITHDRAW THE REFERENCE TO THE BANKRUPTCY COURT** to be served upon all parties who have made appearances in the above-captioned action by electronically filing same, thereby ensuring that counsel to each such party, received same, as registered e-filers who are registered to receive e-notices in this case;

3. On April 29, 2008, I caused copies of the **DECLARATION OF JOHN H. EICKEMEYER IN SUPPORT OF ARCH INSURANCE COMPANY'S MOTION TO WITHDRAW THE REFERENCE TO THE BANKRUPTCY COURT** to be served upon all parties who have not yet made appearances in the above-captioned case by dispatching true copies of same into the custody of a courier service for overnight delivery, prior to the latest time designated by that service for such delivery, addressed as follows:

John D. Agolia  
3 Sweet Hollow Ct.  
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DATED: April 29, 2008

/s/ John H. Eickemeyer  
John H. Eickemeyer

# Exhibit A

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In Re: : 05-60006  
:   
REFCO, INC., : One Bowling Green  
: New York, New York  
Debtors. : June 8, 2006  
-----X

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: SALLY HENRY, ESQ.  
BENNETT S. SILVERBERG, ESQ.  
Skadden, Arps, Slate, Meagher & Flom  
Four Times Square  
New York, New York 10036

For the Creditors Com.: LUC A. DESPINS, ESQ.  
ANDREW LEBLANC, ESQ.  
DENNIS O'DONNELL, ESQ.  
SUSHEEL KIRPALANI, ESQ.  
Milbank, Tweed, Hadley & McCloy  
One Chase Manhattan Plaza  
New York, New York 10005

For Mr. Varga: PETER PANTALEO, ESQ.  
LAURA HADFIELD, ESQ.  
Simpson, Thacher & Bartlett

For Sphinx: DAVID CRICHLOW, ESQ.  
Pillsbury, Winthrop, Shaw, Pittman  
1540 Broadway  
New York, New York 10036

For Masonic Home: MARC DONATO, ESQ.  
Bond, Schoeneck & King, PLLC  
1 Lincoln Center  
Syracuse, New York 13202

(Appearances continued on next page)



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

APPEARANCES CONTINUED:

For the Fund:	ALEC OSTROW, ESQ. Stevens & Lee 485 Madison Avenue New York, New York 10022
For Plus Funds:	JERROLD L. BREGMAN, ESQ. Curtis, Mallet-Prevost, Colt & Mosle 101 Park Avenue New York, New York 10178
For du Depot:	STEPHEN SHIMSHAK, ESQ. Paul, Weiss, Rifkind, Wharton & Garrison, LLP 1285 Avenue of the Americas New York, New York 10019
For RCM Trustee:	TIMOTHY DISEINO, ESQ. Bingham, McCutchen, LLP 399 Park Avenue New York, New York 10022
For Merrill, Lynch:	MARC DWORSKY, ESQ. Raymond, James & Rydex
Court Transcriber:	CARLA NUTTER TypeWrite Word Processing Service 356 Eltingville Boulevard Staten Island, New York 10312

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service

1 THE COURT: Refco.

2 MS. HENRY: Good morning, Your Honor.

3 For the record, my name is Sally Henry. I'm with  
4 Skadden, Arps, Slate, Meager & Flom, LLP, counsel to Refco,  
5 Inc. and the other Chapter 11 debtors with the exception of  
6 RCM.

7 One of my colleagues once referred to bankruptcy  
8 court as more akin to IWW wrestling than to boxing and to a  
9 certain extent that's true today because we have a big change  
10 in the calendar.

11 Peter Pantaleo, who is counsel for certain  
12 affiliates of parties to the first set of motions that is on  
13 would like to address the Court first and I agree with him.

14 THE COURT: All right.

15 Can you give me the most recent agenda letter  
16 though?

17 You've already given it to me?

18 Thanks.

19 All right.

20 Mr. Pantaleo, are you all set?

21 MR. PANTALEO: All set, yes.

22 THE COURT: Okay.

23 MR. PANTALEO: Your Honor, good morning and thank  
24 you for hearing me, I guess, grossly out of order given the  
25 number of matters I imagine you have on the agenda today.

1 those orders to court.

2 MR. SILVERBERG: Thank you, Your Honor.

3 MS. HENRY: Your Honor, do I understand the Court  
4 to want to break at this point?

5 THE COURT: Well, I'm tempted to address the Arch  
6 Insurance Company motion.

7 MS. HENRY: Okay.

8 THE COURT: Unless they want to -- unless you all  
9 want a break.

10 MS. HENRY: I think Arch is ready to go forward.  
11 I spoke to their counsel a short time ago and we are ready to  
12 go forward.

13 THE COURT: Okay.

14 MR. STANDISH: Good afternoon, Your Honor. Daniel  
15 Standish of Wiley, Rein & Fielding on behalf of Arch Insurance  
16 Company.

17 Your Honor, by our motion we seek to obtain the  
18 Court's determination whether or not the automatic stay applies  
19 to coverage litigation involving the claim that individual  
20 defendants in underlying litigation have made against the Arch  
21 policy.

22 In particular, we're aware of Your Honor's comments  
23 at the time of the hearing of U.S. Specialties motion to  
24 advance defense fees and costs, and out of an abundance of  
25 caution have opted not to prosecute the declaratory judgment

1 action that was filed in order to obtain a ruling from this  
2 court.

3 We submit, Your Honor, that the automatic stay  
4 does not apply to the policies at issue in this case for  
5 several reasons. First of all, the coverage dispute that's at  
6 issue in the underlying coverage litigation involves insuring  
7 agreement A, which is the insuring agreement that applies  
8 solely to directors and officers for their direct coverage  
9 under the policy.

10 Secondly, Your Honor, there is a very strong  
11 priority of payments provision in this particular policy that  
12 gives coverage under insuring agreement A priority over other  
13 coverage grants in the policy including the coverage grants  
14 that would extend to the debtor for indemnification coverage  
15 for securities claim coverage.

16 Third, Your Honor, Arch is not seeking to avoid  
17 the policy, so the validity of the policy, which we concede  
18 would be deemed an asset of the estate, is not at issue in the  
19 underlying litigation. This is a circumstance where Arch is  
20 merely seeking to obtain a determination of coverage with  
21 respect to certain policy terms and conditions.

22 THE COURT: Would those terms and conditions apply  
23 equally to the entity coverage and the B coverage?

24 MR. STANDISH: That's uncertain, Your Honor. Well,  
25 they certainly apply cross the board, but there are no claims

1 for coverage at this juncture under these so-called insuring  
2 agreement B.

3 THE COURT: But in terms of construing the  
4 language of the contract, it's the same language that applies to  
5 A, B, and entity?

6 MR. STANDISH: It would apply to all the insuring  
7 agreements. That's correct, Your Honor.

8 THE COURT: Okay.

9 MR. STANDISH: But with respect to those insuring  
10 agreements, again, they are subordinated to insuring agreement  
11 A, so particularly in the context of this case and just  
12 focusing on one of the underlying matters that gives rise to  
13 the coverage dispute, the securities litigation that's pending  
14 against the individual defendants and with respect to which a  
15 request for coverage has been made, alleges that the market cap  
16 loss is in the hundreds of millions of dollars.

17 So it's not difficult to foresee a probability at  
18 some juncture in the not-too-distant future, there may be  
19 settlement demands in that case in Arch, as well as the  
20 individual insureds, will need to determine their respective  
21 rights and obligations and determine whether or not insuring  
22 agreement A applies.

23 And again, insuring agreement A takes precedence  
24 over the other insuring agreements in the policy.

25 THE COURT: Okay.

1 MR. STANDISH: With respect to even assuming the  
2 stay applies, Your Honor, for those reasons we also submit it  
3 should be lifted to allow the prosecution of the coverage  
4 litigation. The need for certainty in the context of the  
5 ongoing litigation against the individuals that has not been  
6 stayed is quite important. It's important for Arch and the  
7 individual insureds to know whether or not there's coverage  
8 available for any settlement.

9 It's important for Arch and individual insureds to  
10 know whether or not there's coverage available for any defense  
11 fees and costs that may incur in connection with the underlying  
12 case. So for those reasons and the need for certainty, we  
13 submit that the stay to the extent it applies should be lifted  
14 to allow the parties to obtain the certainty.

15 Now, the debtors and certain other of the  
16 objectors have suggested that they would be prejudiced by a  
17 determination of the coverage issues, and we submit that that's  
18 not the case for a variety of reasons.

19 First of all, there's been no suggestion that the  
20 individual defendants won't adequately argue and press their  
21 views on the coverage issues and the coverage litigation, so  
22 the suggestion that the interests in establishing coverage won't  
23 be represented would be inaccurate.

24 Second, any future claim that's been suggested or  
25 hinted at in these papers is purely hypothetical at this point

1 in time. There's no clear indication that there actually will  
2 be any sort of claim for coverage under the Arch policy under  
3 the policy -- under the coverage grants extended to the debtor,  
4 so it's purely hypothetical.

5 Third, Your Honor, there's been a suggestion that  
6 the Court should issue an injunction under Section 105, and we  
7 submit that request has not been properly teed up. There has  
8 not been an adversary proceeding that has been filed. There  
9 has been no motion for an injunction under Section 105. And  
10 even were the Court to entertain that request, an injunction  
11 would be inappropriate here given the nature of the coverage,  
12 the very strong priority of payment provision that exists in  
13 the primary policy and the fact that what Arch is doing here is  
14 not seeking to avoid the coverage.

15 And in that regard, I'd like to focus on Judge  
16 Gerber's decision in Adelphia on remand when he looked at the  
17 issues. What he was concerned about was the insurers pressing  
18 their rescission arguments, rescinding the policy, declaring  
19 that the policy was void ab initio. Arch is not seeking that  
20 determination here. It's simply seeking a determination that  
21 the claims under the policy that are presently being pressed by  
22 the individual insureds are not covered. The Arch policy  
23 otherwise remains in place subject to its terms and conditions  
24 until its expiration on August 11, 2006.

25 So under those circumstances we submit that this

1 is not a circumstance that warrants the extraordinary issuance  
2 of an injunction under Section 105.

3 THE COURT: Okay.

4 MS. HENRY: Good afternoon, Your Honor. Sally  
5 Henry on behalf of the Chapter 11 debtors. The debtors have  
6 expressed their concern, I think, in the reply papers. The  
7 concern is that there would be an interference, which -- with  
8 that which is potentially a state property. More specifically,  
9 the concern is that there would be this litigation going on,  
10 and we recognize that it technically would not bind the  
11 debtors, but as a practical matter it could have a great effect  
12 on the debtors.

13 As you know, the debtors' cases are only seven  
14 months old at this time, and moreover the debtors have a short  
15 window under the revised code to get their reorganization plan  
16 process completed. The debtors think it's most important to  
17 focus on that at this time, and in balancing the harms I've  
18 heard nothing from Arch that shows an immediate timetable that  
19 gives them a particular problem, whereas I think the number of  
20 issues that the debtors have to address is clear from the  
21 nature of the process.

22 THE COURT: Well, they say that they need -- they  
23 may well need at least to have the coverage issue decided  
24 promptly, because it may affect not only whether they can be  
25 held for a failure to provide coverage or alternatively if they



1 do it under reservation, then they won't be -- they won't have a  
2 right to be heard on a settlement or to veto a settlement.

3 MS. HENRY: Well, yes, but they don't set forth the  
4 specific timetable that gives them a particularized problem at  
5 this juncture, Your Honor.

6 THE COURT: Okay.

7 MS. HENRY: That's the point that the estate is  
8 making.

9 THE COURT: Isn't it likely that at least some of  
10 these defendants, some of whom are pretty well heeled, will in  
11 any event be putting up the main defense, whereas if I kept the  
12 stay in place the issue would have to be decided somewhere? It  
13 would probably be decided here?

14 MS. HENRY: Eventually these issues would be  
15 decided, Your Honor, and it's true that some of these people are  
16 extremely wealthy, but other people are people who worked at  
17 this company. I mean, one person worked through this -- to  
18 the -- worked for this company around the clock getting the  
19 petitions ready to be filed, and I don't believe it's a person  
20 of great wealth, so it's not just the people whose, you know,  
21 faces are on the front page of The Wall Street Journal. It's  
22 people who work around the clock trying to help this  
23 reorganization in its inception.

24 THE COURT: Okay. Are they doing that now?

25 MS. HENRY: I don't believe that there is anyone

1 particularly who is doing that now, Your Honor. I could be  
2 mistaken, but I don't believe that's the case.

3 THE COURT: Okay.

4 MS. HENRY: Thank you, Your Honor.

5 THE COURT: Okay.

6 MR. O'DONNELL: Your Honor, Dennis O'Donnell,  
7 Milbank, Tweed, Hadley & McCloy on behalf of the official  
8 committee. Your Honor, we filed a similar objection making all  
9 of the same arguments that the debtor makes, and I won't belabor  
10 the point. We support -- we also oppose the motion and ask the  
11 Court not grant it.

12 THE COURT: Okay. Is there a time -- oh, I'm  
13 sorry.

14 MR. HANNAFAN: Good morning, Your Honor --  
15 afternoon, I guess. Floyd Hannafan of Michael T. Hannfan &  
16 Associates on behalf of Tony Grant. We also filed objections  
17 adopting the debtors and their trustees.

18 THE COURT: Okay.

19 MR. LEVIN: Good afternoon, Your Honor. Ira  
20 Levin, Lowenstein & Standler. I represent the lead plaintiffs  
21 in the securities litigation. I also join in the objections  
22 filed by the committee and the debtor.

23 THE COURT: Is there a timetable in the  
24 litigation? Are you facing some sort of deadline?

25 MR. HANNAFAN: In the securities litigation, it's

1 ongoing, Your Honor. Motions to dismiss are scheduled to be  
2 filed soon. My understanding is the briefing will be completed  
3 by October of this year. In our experience, the motion to  
4 dismiss briefing can be quite important. There can be  
5 settlement pushes both before and after that briefing is  
6 completed, particularly in a case with allegations of  
7 substantial market cap loss.

8           So from Arch's perspective, we face the prospect of  
9 demands for action on the part of our company, potential  
10 allegations of bad-faith failure to do so if we don't respond  
11 quickly. In addition, there's a state law doctrine to the  
12 extent Illinois law is deemed to apply to this policy, which  
13 was issued to Refco at an Illinois address with Illinois  
14 amendments. There's a doctrine called the Ehlco Liquidating  
15 Trust doctrine that requires insurers promptly to file  
16 declaratory judgment actions under certain circumstances or  
17 risk waiver.

18           We would not want to be subjected to those types  
19 of arguments. That's another temporal consideration that led  
20 Arch to conclude it was most prudent in light of potentially  
21 applicable state law to seek a prompt adjudication of the  
22 parties' rights and obligations.

23           THE COURT: Okay. Ms. Henry, is there anything --  
24 any point in particular that you're waiting for or some  
25 development of some issue that -- at which point this motion

1 would be appropriate to grant?

2 MS. HENRY: No, Your Honor, there is not. Rather,  
3 the emphasis is on the fact that we do have a very tight  
4 timetable for coming up with a consensual plan, and that's where  
5 we think the emphasis should be for the estate right now at  
6 this time, instead of monitoring this litigation. In light of  
7 the fact of what -- basically what you just heard, I think is  
8 that there is no particular timetable for Arch.

9 THE COURT: Okay.

10 MS. HENRY: Thank you.

11 THE COURT: All right. I have in front of me Arch  
12 Insurance Company's motion for relief of the automatic stay to  
13 the extent the stay is applicable. The stay relief that Arch  
14 seeks is to prosecute coverage litigation against directors and  
15 officers who are beneficiaries of the debtors' D&O policy. Arch  
16 brings the motion out of an abundance of caution, given that  
17 the policy also covers the debtor as a beneficiary both in  
18 respect of an indemnity obligation as well as entity coverage.  
19 However, those two forms of coverage are subordinate to the  
20 coverage of the officers and directors.

21 The litigation that Arch would pursue would not be  
22 against the debtor, but would be against the directors and  
23 officers as a matter of law. Consequently, any result in that  
24 litigation would not be binding as a matter of res judicata or  
25 collateral estoppel on the debtors.

1           However, a determination would have persuasive  
2 effect, because, as Arch acknowledges, the language pertaining  
3 to the directors and officers that is at issue in its coverage  
4 litigation is the same language that applies to the debtor were  
5 it to be a party to the litigation or a subsequent litigation  
6 of the same issues.

7           I believe that this lawsuit, since it does seek a  
8 construction of the insurance policy as opposed to a lawsuit  
9 that deals with proceeds of the policy (which may be a closer  
10 question), is subject to the automatic stay, in that it is  
11 clear that the policy itself is property of the estate.

12           However, based upon the facts set forth in the  
13 motion and in the response and oral argument, I believe that  
14 Arch is entitled to relief from the automatic stay for cause,  
15 because the balance of the harms in this instance (and clearly  
16 so, I believe) is in favor of Arch. First, as far as the  
17 potential harm to Arch is concerned if the stay is not lifted,  
18 based on my review of the case law that Arch has cited, as well  
19 as other case law, I believe that Arch is at risk of two things  
20 if it does not promptly prosecute the coverage action.

21           The first is that, potentially under the Ehlco  
22 doctrine laid out in Employer's Ins. of Wausau v. Ehlco  
23 Liquidating Trust, 708 N.E.2d 1122, 1138 (Ill. 1999), is that  
24 it may not be able to disaffirm coverage if it doesn't promptly  
25 challenge the D&O's right to coverage, or bear some other

1 adverse consequence, such as being found to have improperly  
2 denied coverage.

3 In addition, it appears to me -- again under  
4 Illinois law -- that if, as would be prudent if I kept the stay  
5 in place, Arch bore the burden of defense with a reservation of  
6 rights as regards to coverage, it appears to me that Arch would  
7 lose its right to consent to or to veto a settlement. See In  
8 Re: HA 2003 Inc., 310 BR 710, 724, N. D. Ill. 2004).

9 So, given the schedule that the securities  
10 litigation is represented to be on, which includes a potential  
11 for serious activity by October including submission of briefs  
12 and, potentially, rulings by the Court, I believe that there is  
13 a fair chance that there will be settlement discussions at that  
14 point.

15 On the other hand, it's clear that the debtor's  
16 direct interests under the policy are subordinated to the  
17 officers and directors, that the officers and directors are  
18 likely, in addition, to vigorously defend the coverage  
19 litigation in their own stead, and, lastly, while a potential  
20 source to satisfy claims may be reduced as a result of the  
21 litigation, that is an indirect effect on the estate as opposed  
22 to a direct one. And, indeed, given the lack of any res  
23 judicata or collateral estoppel effect, I believe that the  
24 indirect effect of the litigation, even were Arch to be  
25 successful, is too remote to justify the stay remaining in

1 place.

2                   Indeed, the Ninth Circuit, faced with a similar  
3 issue, ruled in In re: Pintlar Corporation, 124 F.3d 1310 (9th  
4 Cir. 1997), that the stay would not apply at all in such a  
5 situation. I disagree with that logic, but do believe that the  
6 debtor's interest is so remote that the stay should be lifted  
7 here.

8                   I don't think I have an order with a disk, so I  
9 think you should submit that after running it by Ms. Henry and  
10 counsel for the committee.

11                   MR. HANNAFAN: We will, Your Honor.

12                   THE COURT: Okay.

13                   MS. HENRY: Thank you, Your Honor.

14                   THE COURT: Okay. All right. It's 1:00. I'll  
15 come back at 2:00 on the motion for the appointment of an  
16 equity committee.

17

18

19

20

21

22

23

24

25

\* \* \* \* \*

I certify that the foregoing is a court transcript from  
an electronic sound recording of the proceedings in the above-  
entitled matter, except where, as indicated, the Court has  
modified its bench ruling.

Carla Nutter

Dated: 6/9/06



# Exhibit B

## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN*Justice*PART 39Arch Ins. Co.,

Plaintiff,

INDEX NO. 600805/06

MOTION DATE \_\_\_\_\_

- v -

Phillip R. Bennett et al.,

Defendants

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause · Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

The motions with sequence numbers 001, 002, and 005 are consolidated for joint disposition.

In this lawsuit, plaintiff Arch Insurance Company ("Arch") seeks declaratory judgments that its excess liability insurance policy does not afford coverage to former directors and officers of a now-bankrupt corporation, Refco, Inc. ("Refco, Inc."), and Refco affiliates. Defendants now move for orders dismissing or staying this action primarily on the grounds that it is premature and unripe, and that it should await the outcome of a related criminal trial. For the reasons set forth below, the motions are granted to the extent that the complaint is dismissed without prejudice.

*Background* — Refco, a publicly-traded corporation which provided services to financial markets, collapsed immediately after the company announced on October 10, 2005 that its financial statements failed to disclose that it carried an undisclosed receivable of \$ 430 million from an entity that Refco's CEO, Phillip Bennett, controlled. On the following day, Refco announced that the receivable derived largely from uncollectible debt that third parties owed to Refco.

Refco filed for bankruptcy on October 12. In November 2005, a federal grand jury indicted Bennett on charges of securities fraud and related charges; the indictment alleged that Bennett

sought to hide from, among others, Refco's auditors and investors, losses sustained by Refco through its own and its customers' trading in the financial

Page 1 of 4

markets. To that end, Bennett transferred losses from Refco to a company controlled by Bennett, directed a repeated series of transactions designed to conceal those losses at year- and quarter-end from Refco's auditors and others, and caused Refco to make false and fraudulent public filings with the [SEC].

In addition, Refco shareholders, bondholders, customers, and others have filed at least six civil lawsuits (the "Underlying Lawsuits") which, like the criminal proceeding, accuse Bennett of concealing Refco's bad debt through a series of sham transactions. The defendants in this action are defendants in some or all the Underlying Lawsuits.

*Insurance Policies* – Refco and its affiliates simultaneously held five primary and excess "Directors and Officers" insurance policies that provided one year of coverage beginning on August 11, 2005. The primary carrier, U.S. Specialty Insurance Company ("U.S. Specialty"), covers liability of up to an aggregate of \$ 10 million for a number of types of claims. The first tier excess carrier, Lexington Insurance Company ("Lexington"), covers the next \$ 7.5 million of liability; Lexington and its insureds dispute whether the policy covers legal defense costs. The second tier excess carrier, Axis Reinsurance Company ("Axis"), covers the next \$ 10 million of aggregate liability, inclusive of defense costs. The third tier excess carrier, Allied World Assurance Company ("AWAC"), provides an aggregate liability limit of \$ 12.5 million, including defense costs.

The fourth tier excess carrier, plaintiff Arch, issued a policy that limits liability, including defense costs and expenses, to an aggregate of \$ 10 million for "Claims." The Arch policy also states that its coverage extends no further than that provided by the most restrictive underlying policy.

Certain defendants have tendered their defense of the Underlying Lawsuits to, and demanded indemnification from, the aforementioned insurers. U.S. Specialty has reserved its rights to deny coverage but has paid or reimbursed several defendants for defense costs totaling about \$ 4.9 million as of October 2006. None of the excess coverage has been reached. Lexington initially reserved its rights and denied coverage for defense costs on the ground that its policy did not cover them. However, Lexington later agreed to advance defense costs if defendants agreed to repay them if they were later determined not to be covered.

AWAC denied coverage, in part, based on its policy's "Prior Knowledge Exclusion," which excludes coverage for all of its insureds with respect to claims that arose from circumstances which any insured knew about as of August 11, 2005, if the insured expected or should have expected those circumstances to lead to future insurance claims against AWAC. In addition, the AWAC policy mandates that any coverage disputes under its policy are subject to alternative dispute resolution ("ADR").

Arch responded to defendants' coverage demands by filing this declaratory judgment action. The first count in the amended complaint seeks a declaration that, since Arch's policy incorporates any coverage restrictions in the underlying insurance policies, the AWAC's Prior Knowledge Exclusion bars coverage for the Underlying Lawsuits. Arch asserts that the AWAC Prior Knowledge Exclusion applies because of what Bennett knew as of August 11, 2005.

In the second count, Arch seeks a declaration that the Prior Knowledge Exclusion in its own policy bars coverage, due to Bennett's knowledge as of August 11, 2005.

The third count seeks a declaration that the Arch policy does not cover defense costs because the Lexington policy excludes them.

*Motions: Officer Defendants* – In motion number 001, defendants Tone Grant, Dennis A. Klejna, Joseph Murphy, Perry Rotkowitz, William M. Sexton, Gerald Sherer, Philip Silverman and Robert C. Trosten (the "Officer Defendants") move for an order dismissing the complaint on the ground that no justiciable dispute currently exists between Arch and the movants, because it is unlikely that coverage under the Arch policy will ever be reached. That could not occur until defendants' claims exceed \$ 40 million and exhaust the coverage that U.S. Specialty, Lexington, Axis, and AWAC provide.

To maintain a declaratory judgment action, a plaintiff must have an "interest sufficient to constitute standing to maintain the action," and must face "present, rather than hypothetical, contingent or remote, prejudice." *Am. Ins. Assoc. v. Chu*, 64 N.Y.2d 379, 383 (1985). This lawsuit is dismissed as premature because at present the chances of Arch's policy being triggered are too remote. The primary carrier has paid out less than half of its policy limit, and none of the other excess carriers' coverage has been reached. Moreover, Arch fails to show that potential judgments, settlements and defense costs related to the Underlying Lawsuits are likely to exceed \$ 40 million. It is particularly unlikely that the movants will incur defense costs that exceed \$ 40 million, and accordingly the third count in Arch's complaint, which pertains only to defense costs, is especially unripe.

As an additional ground for dismissal, the Officer Defendants point out that the first and second counts, which invoke the Prior Knowledge Exclusion in the AWAC and Arch policies, are unripe because they are predicated on claims against Bennett that will be determined in the Underlying Lawsuits. "The general rule is that a declaratory judgment as to a carrier's obligation to indemnify may be granted in advance of trial of the underlying tort action only if it can be concluded as a matter of law that there is no factual or legal basis on which the insurer may eventually be held liable under its policy." *First St. Ins. Co. v. J & S United Amusement Corp.*, 67 N.Y.2d 1044, 1046 (1986). If a carrier's obligation to indemnify its insured turns on an issue of fact that the underlying action will determine, the carrier cannot bring a declaratory judgment action to determine the issue. *See Allstate Ins. Co. v. Santiago*, 98 A.D.2d 608, 608 (1st Dept. 1983). Arch seeks a declaration that the Prior Knowledge Exclusion bars coverage because Bennett concealed related party transactions and uncollectible receivables, and accordingly knew that Refco's financial statements were misleading. However, these accusations against Bennett are central to the Underlying Lawsuits and must be adjudicated in those actions.

The Officer Defendants' final argument is that the first count, which invokes the AWAC policy's Prior Knowledge Exclusion, should be dismissed or stayed because litigating Arch's claim would conflict with the Officer Defendants' right to resolve coverage issues with AWAC through ADR. This issue does not need to be reached because the Prior Knowledge Exclusion in the Arch policy, which the second count invokes, does not afford movants a right to ADR, and because the first count is dismissed for other reasons.

*Director Defendants* – In motion number 002, defendants Leo R. Breitman, Nathan Gantcher, David V. Harkins, Scott L. Jaekel, Thomas H. Lee, Ronald L. O'Kelley, and Scott A. Schoen (the "Director Defendants") seek dismissal on the ground that "Arch has ignored that it is contractually obligated to advance defense costs." In support, the Director Defendants cite to *Fed. Ins. Co v Kozlowski*, 18 A.D.3d 33 (1st Dept. 2005), in which the Appellate Division

recognized that a liability insurer must pay defense costs as they are incurred, and cannot defer payment because the claims against the insured in the underlying litigation, if proven, would bar coverage. However, the Director Defendants' argument does not provide an independent basis for dismissing the complaint. As discussed above, this action is unripe and it would be premature to determine the merits in favor of Arch or against it. Also, it is unlikely that Arch's obligations to pay defense costs will ever be triggered, and its duty to pay defense costs, if any, has no bearing upon its duty to indemnify defendants in the Underlying Lawsuits.

*Stephen Bennett* – In motion 005, defendant Stephen Bennett separately moves for a stay of this action on the ground that he is being criminally prosecuted, and defending Arch's lawsuit would require him to waive his right against self-incrimination and jeopardize his criminal defense. While it appears that the relevant factors weigh in favor of staying this action until the criminal proceedings against Bennett conclude, this action is being dismissed as premature and accordingly the question of a stay need not be reached.

ORDERED that the motions are granted to the extent that the complaint is dismissed without prejudice, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 20, 2007

  
Helen E. Freedman, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

# Exhibit C

Hearing Date: August 30, 2007, 10:00 a.m.  
Reply Date: August 29, 2007

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	x	Chapter 11
In re	:	
	:	Case No. 05-60006 (RDD)
REFCO INC., et al.,	:	
	:	Jointly Administered
Debtors.	:	
-----	x	
	:	
AXIS REINSURANCE COMPANY,	:	Adv. Proc. No. 07-01712-rdd
	:	
Plaintiff,	:	
v.	:	
	:	<i>Electronically Filed</i>
PHILLIP R. BENNETT, et al.,	:	
	:	
Defendants.	:	
-----	x	

**OPPOSITION OF DEFENDANTS DENNIS KLEJNA, JOSEPH MURPHY,  
WILLIAM M. SEXTON, GERALD SHERER AND PHILIP SILVERMAN TO MOTION  
TO INTERVENE OF ARCH INSURANCE COMPANY**



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Defendants Dennis Klejna, Joseph Murphy, William M. Sexton, Gerald Sherer and Philip Silverman (collectively, the "Officer Defendants"), each a former officer of Refco, Inc. or its direct or indirect subsidiaries (collectively, "Refco"), submit this Memorandum in opposition to the motion by Arch Insurance Company ("Arch"), pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, for entry of an order permitting Arch to intervene as a counterclaim defendant in the instant adversary proceeding.

### **PRELIMINARY STATEMENT**

The present adversary proceeding was commenced by Axis Reinsurance Company ("Axis"), the second excess insurer in the tower of Directors and Officers ("D&O") liability insurance obtained by Refco for the policy period that began in August 2005. Axis seeks a declaratory judgment that there is no coverage for any of the defendants herein under Axis' policy (the "Axis Policy"). The Officer Defendants have filed counterclaims against Axis which seek declaratory and injunctive relief under the Axis Policy. The Officer Defendants have also filed a motion for an order directing Axis to pay their defense costs while coverage under the Axis Policy is being litigated in this adversary proceeding.

Arch, the fourth excess insurer in the Refco D&O tower, seeks to intervene as a counterclaim defendant for the ostensible purpose of opposing the Officer Defendants' motion for advancement of defense costs. As is apparent from the face of Arch's motion and its proposed "Reply and Affirmative Defenses" to the Officer Defendants' Counterclaims against Axis (Arch Motion to Intervene, Exs. B, C, D), Arch's intervention motion is nothing short of bizarre: The Officer Defendants' Counterclaims assert no claims against Arch and seek no determination or interpretation of any provision under the Arch policy (the "Arch Policy"). Yet, Arch seeks to file "Replies" that respond to factual allegations asserted by the Officer

Defendants against Axis (not Arch) and to assert affirmative defenses on behalf of Arch (not Axis) to non-existent claims against Arch. Arch's proposed "Replies" would inject issues that need not and should not be adjudicated as part of this adversary proceeding.

Similarly, and critically for its motion, Arch's moving papers clearly state that Arch seeks to litigate the issue of whether its own policy – and not the Axis Policy – requires advancement of defense costs. However, the Arch Policy is not at issue in this action and the Officer Defendants have not sought advancement under the Arch Policy. For this reason alone, intervention should be denied.

In addition, because it is constrained by an order of the New York State Supreme Court that dismissed as premature an action brought by Arch in 2006, Arch is not seeking to adjudicate herein the ultimate issue of whether there is coverage under the Arch Policy, but instead seeks to oppose advancement of defense costs and to litigate the merits of its prior knowledge exclusion in that context – even though no one is seeking advancement of defense costs against Arch and the New York State Supreme Court made clear that the issue of "prior knowledge" for purposes of the exclusion must be determined in the underlying actions. This procedural gamesmanship by Arch is not only improper, but would result in plain judicial inefficiency and prejudice to the Officer Defendants, as the issue of coverage under the Arch Policy is not pending before any court, and Arch is plainly seeking to have two "bites at the apple" in trying to avoid advancement.

Finally, as Arch itself acknowledges that "Axis and Arch have relied upon different policy provisions in denying coverage" and states that, as a result, different showings will be required in order to obtain advancement, Arch has failed to even make the threshold showing required under Rule 24(b) of a common question of law or fact. Even if Arch has made that

showing, however, it is clear that this Court should exercise its broad discretion under Rule 24(b) and deny Arch's motion.

### **STATEMENT OF FACTS**

#### **A. Background**

The collapse of Refco in October 2005 and the bankruptcy filings that quickly followed led to a series of civil lawsuits, government investigations, and criminal proceedings, a number of which remain pending. Of particular note, discovery has begun in *In re Refco, Inc. Securities Litigation*, 05 Civ. 8626 (S.D.N.Y.) (the "Securities Litigation"), a class action brought on behalf of Refco bondholders and shareholders.

As set forth above, the Officer Defendants are former officers of Refco. Because of their positions with Refco, each of the Officer Defendants has been named as a defendant in one or more of several lawsuits arising from the collapse of Refco (the "Underlying Matters"), including the Securities Litigation, although none of the Officer Defendants has been charged with any wrongdoing by any governmental body. The Officer Defendants have tendered the Underlying Matters to, and/or demanded indemnification from, Refco's insurers.

#### **B. The Refco D&O Policies**

Refco procured a tower of D&O insurance, consisting of a primary policy and five excess policies for the policy period of August 11, 2005 to August 11, 2006. The primary D&O policy was issued by U.S. Specialty ("U.S. Specialty") with a \$10,000,000 limit of liability (the "U.S. Specialty Policy," or "Primary Policy"). (A copy of the U.S. Specialty Policy is attached as Exhibit B to the Axis Complaint ("Compl.") in this action.) Although U.S. Specialty initially reserved its rights as to coverage, it has paid or reimbursed the defense costs of the insureds with respect to the Underlying Matters up to its policy limit.

The first excess policy above the U.S. Specialty Policy was issued by Lexington Insurance Company (“Lexington”) (the “Lexington Policy,” attached to the Complaint as Exhibit C). The limit of liability of the Lexington Policy is \$7,500,000 in excess of the \$10,000,000 Primary Policy. Lexington initially reserved its rights, and specifically denied coverage for defense costs on the ground that the Lexington policy’s definition of “Loss” excluded attorneys’ fees and costs. However, Lexington subsequently agreed, subject to a reservation of rights, to voluntarily advance attorneys’ fees and costs under the Lexington Policy to insureds who entered into an agreement to repay advances if it was subsequently determined that there was no coverage for defense costs under the U.S. Specialty Policy or the Lexington Policy.<sup>1</sup> As of August 2007, Lexington has paid or reimbursed the defense costs of the insureds with respect to the Underlying Matters up to its policy limit.

Axis issued the second excess policy, with a limit of liability of \$10,000,000 above the \$17,500,000 in underlying coverage. (See Compl. Ex. A.) By letter dated March 6, 2006, Axis asserted various grounds for denying coverage to the insureds for the Underlying Actions. (See Compl. Ex. G.)

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<sup>1</sup> On or about October 17, 2006, defendants Dennis Klejna and Joseph Murphy filed a declaratory judgment action in New Jersey Superior Court against Lexington seeking a declaration that the Lexington Policy covers defense fees and costs. Declaration of Helen B. Kim (“Kim Decl.”), dated Aug. 23, 2007, Ex. A at p. 3. Incredibly, Arch now suggests that it was somehow improper for Klejna and Murphy to litigate against Lexington, rather than against Arch, the issue of the construction of the Lexington Policy. (See Arch Motion to Intervene ¶ 12.) Plainly, the New Jersey court disagreed. In response to Lexington’s motion to this Court for relief from the automatic stay for leave to intervene in the *Arch* action then pending in New York Supreme Court, the New Jersey court preliminarily enjoined Lexington from intervening in the *Arch* action and also denied Lexington’s motion to dismiss. Kim Decl. Ex. A at p.3. On August 3, 2007, based on a Stipulation of Law and Facts agreed to by Lexington, Murphy and Klejna, the New Jersey court granted summary judgment in favor of Klejna and Murphy, holding that the Lexington Policy’s definition of “Loss” included defense costs and fees. Kim Decl. Ex. B. The New Jersey court also awarded Klejna and Murphy their attorneys fees and costs in litigating the New Jersey action. *Id.* at pp. 2-3.

Arch also wrongly contends that the Officer Defendants took inconsistent positions on “ripeness” (see Arch Motion to Intervene ¶ 12). The Officer Defendants did no such thing. The Officer Defendants contended – and the New York court agreed – that the coverage lawsuit by *Arch*, the fourth excess insurer, was not ripe. But neither the insureds nor Lexington ever contended that the issue of whether the Lexington Policy covered defense costs was not ripe as to *Lexington*, the first excess insurer. Kim Decl. Ex. C.

The third excess carrier is Allied World Assurance Company (“AWAC”), with a policy providing a limit of liability of \$12,500,000 (the “AWAC Policy”) in excess of \$27,500,000 in underlying insurance. Although AWAC has also denied coverage, in part based upon Endorsement No. 3 to the AWAC Policy, its “Prior Knowledge Exclusion,” the AWAC Policy contains a provision that mandates alternative dispute resolution between the Insureds and AWAC with respect to disputes over provisions in the AWAC Policy.

As indicated above, Arch is the fourth excess carrier on the Refco D&O insurance tower, with a policy limit of liability of \$10 million in excess of \$40 million in underlying insurance.

**C. The Prior Arch Litigation**

On or about March 9, 2006, Arch commenced an action in the New York Supreme Court seeking a declaratory judgment that the Arch Policy “affords no coverage for [insureds] in connection with the Underlying Matters” (the “Arch action”). In addition to the Arch Policy, Arch invoked provisions of both the Lexington and AWAC policies in alleging no coverage. Notably, Arch did not rely upon any provision of the Axis Policy in its declaratory judgment action.

The first count in the *Arch* action sought a declaratory judgment that the “prior knowledge” exclusion in the AWAC Policy barred coverage for the Underlying Matters under the Arch Policy, based upon the Arch Policy’s incorporation of any “terms and conditions in . . . any other underlying insurance ‘further limiting or restricting coverage.’” (Jacobs Decl. Ex. 3, at ¶¶ 24, 76-79.) Arch asserted that the AWAC Policy’s prior knowledge exclusion should apply due to facts and circumstances allegedly known to Bennett as of August 11, 2005, the policy inception date. (*Id.* at ¶ 77.)

Arch's second count sought a declaratory judgment that the "prior knowledge" exclusion in the Arch Policy also barred coverage for any loss arising out of the Underlying Matters. (*Id.* at ¶¶ 80-83.) As with the AWAC "prior knowledge" exclusion, Arch alleged that its own prior knowledge exclusion applied due to facts and circumstances allegedly known to Bennett as of August 11, 2005. (*Id.* at ¶ 81.) Notably, Arch's complaint did not assert the existence of, or seek to invoke, a "prior knowledge" exclusion in the Axis Policy.

Arch's third count for declaratory relief alleged that the Lexington Policy did not provide any coverage for defense costs, and that the Arch Policy also thus provided no coverage for such costs incurred by the insureds in connection with the Underlying Matters. (Jacobs Decl. Ex. 3, at ¶¶ 84-88.)<sup>2</sup>

In September 2006, the defendant insureds filed motions to stay and/or dismiss the Arch action. Each of the Officer Defendants moved to dismiss the action on multiple grounds, including for failure to allege a justiciable controversy because the action was premature. (*See* Jacobs Decl. Ex. 5, at pp. 1-10.) On February 20, 2007, Justice Freedman granted the motion and dismissed Arch's entire action without prejudice "as premature because at present the chances of Arch's policy being triggered are too remote." (*See id.* Ex. 6, at p. 3.) As an additional ground for dismissal, the court held that the first and second counts of the Arch complaint, invoking the "prior knowledge" provisions of the AWAC and Arch policies, were not ripe because such counts were "predicated on claims against Bennett that will be determined in the Underlying Lawsuits." (*Id.*) Arch did not appeal from Justice Freedman's February 20, 2007 order (the "Dismissal Order").

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<sup>2</sup> As noted above, litigation in New Jersey to which Lexington was a party has now established that the Lexington Policy does cover defense costs.



**D. The Present Adversary Proceeding**

On May 24, 2007, Axis commenced the instant adversary proceeding, seeking a declaration that its policy does not provide coverage for the Underlying Actions for any of the insureds.<sup>3</sup> On or about July 12, 2007, each of the Officer Defendants filed an Answer to the Axis Complaint and asserted Counterclaims for declaratory and injunctive relief under the Axis Policy.<sup>4</sup> The Counterclaims request (1) a declaration that none of the grounds in the Complaint provides Axis with a valid basis for refusing coverage and (2) permanent injunctive relief requiring Axis to make payments in accordance with Axis' contractual obligations.

Also on July 12, 2007, the Officer Defendants filed a motion for an order to compel Axis to pay defense costs in the Underlying Matters upon the exhaustion of the Lexington Policy (the "Advancement Motion").<sup>5</sup> Axis filed papers in opposition to the Advancement Motion on or about August 13, 2007.

**E. Arch's Motion to Intervene**

On or about August 10, 2007, Arch filed its motion to intervene in the present adversary proceeding pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. In an attempt to avoid violating Justice Freedman's Dismissal Order, Arch expressly states that it "does not seek to adjudicate herein the question of whether there is coverage for the Underlying Matters under the Arch Policy." (Arch Motion to Intervene, at ¶ 3.) Rather, "Arch seeks to intervene as a defendant to the Officer Defendants' counterclaims to the limited extent that the Officer

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<sup>3</sup> Specifically, the Axis Complaint seeks to avoid coverage under the Axis Policy for all Insureds on four grounds: (1) Count I of the Complaint relies on a January 14, 2005 letter signed by Phillip Bennett ("Bennett") as the President and CEO of Refco Group Ltd., LLC; (2) Count II of the Complaint relies on Bennett's failure to answer a question in the application for coverage submitted to U.S. Specialty; (3) Count III of the Complaint relies on a purported "Knowledge Exclusion Endorsement" to the Axis Policy; and (4) Count IV of the Complaint relies upon Clause XI of the Axis Policy. Although the Officer Defendants have moved for advancement under the Axis Policy, no portion of the Axis Policy has yet been tapped in connection with the Underlying Matters.

<sup>4</sup> On August 1, defendants Dennis Klejna and Joseph Murphy filed an Amended Answer and Counterclaims.

<sup>5</sup> Defendants Phillip Bennett, Tone Grant and Robert Trosten joined in the Advancement Motion.

Defendants seek to force the advancement of defense expenses prior to the adjudication of the coverage issues.” (*Id.* at ¶ 2.) In other words, Arch seeks to intervene only on the issue of advancement.

However, Arch seeks to oppose advancement under the *Arch* Policy – not the *Axis* Policy – notwithstanding the fact that the Officer Defendants have never sought advancement under the Arch Policy and have moved for advancement of defense costs solely under the Axis Policy. (See Arch Motion ¶¶ 15, 18-19.)

### **ARGUMENT**

#### **ARCH’S MOTION FOR INTERVENTION UNDER RULE 24(B) SHOULD BE DENIED**

Rule 24(b) of the Federal Rules of Civil Procedure provides for permissive intervention. Under Rule 24(b) “anyone *may* be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common.” (Emphasis added.) “Permissive intervention . . . is discretionary with the trial court” and such “discretion . . . is very broad.” *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986). “In fact, ‘a denial of permissive intervention has virtually never been reversed.’” *Id.* (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 990 n.19 (2d Cir. 1984)).

Denial of Arch’s motion to intervene is plainly warranted for multiple reasons under the facts here. To begin, by its motion, Arch seeks to oppose the advancement of defense costs under the *Arch* Policy in connection with the Underlying Matters. See Arch Motion to Intervene ¶ 15 (“Arch seeks to intervene to litigate the issue whether the Arch Policy requires Arch to advance defense costs pending a final judicial declaration as to coverage issues”). However, the Officer Defendants have never sought advancement under the Arch Policy. In fact, an additional



\$22.5 million in coverage on the Refco D&O tower must be exhausted before the Arch Policy will even begin to be accessed. There is simply no reason why the Officer Defendants, whose motion for advancement was made solely in connection with the Axis Policy, should now be forced by Arch to litigate the separate, non-ripe issue of advancement under the Arch Policy. *See Continental Casualty Co. v. ZHA, Inc.*, 154 F.R.D. 281, 283 (M.D. Fla. 1994) (denying permissive intervention to general liability insurer where the general liability insurer was not a party to a contract between the professional liability insurer and insured that was at issue in the case, and the question of responsibility under such contract would not be determinative as to whether the general liability insurer had liability under its own, separate policies).

By its own argument, Arch's attempt to litigate the issue of advancement under the Arch Policy is also procedurally improper because there is no underlying claim for relief against Arch to support a claim for advancement of defense costs against Arch. Arch avers in its proposed papers in opposition to the Officer Defendants' Advancement Motion (Arch Motion to Intervene, Ex. A at p. 20.) that inasmuch as an advancement motion is in the nature of a motion for preliminary injunctive relief, there must be an underlying claim for relief to support a claim for advancement of defense costs. Here, none of the Officer Defendants or any of the other individual Insureds have asserted any pleading seeking affirmative relief against Arch in this adversary proceeding. Nor has Arch filed any pleading against the Insureds (which would violate Justice Freedman's Dismissal Order, in any event). Accordingly, by Arch's logic, on that ground alone, Arch's attempt to intervene for the purpose of opposing a non-existent claim for advancement of costs against Arch would be improper.

Arch's motion should also be denied because it is plainly attempting an "end run" around the Dismissal Order in its New York action, which held that the Officer Defendants do not yet

have to litigate with Arch over the Arch Policy. As Arch concedes in its Motion, the New York Supreme Court held that “[t]he facts necessary to adjudicate application of the Arch Prior Knowledge Exclusion were ‘central to the Underlying Matters and must be adjudicated in those actions.’” Arch Motion to Intervene, ¶ 11. The New York Supreme Court’s Dismissal Order is *res judicata* as to Arch, and Arch thus has no right now to litigate the merits of the Arch prior knowledge exclusion in this action, either in the context of ultimate coverage or in the context of an advancement motion.

Moreover, because Arch is not seeking to have the issue of coverage under the Arch Policy adjudicated here, its motion would result in obvious judicial inefficiency by forcing two separate adjudications of issues raised by the policy – one in the context of advancement and the other on the issue of actual coverage. Such a result, contrary to Arch’s contention, would also clearly prejudice the Officer Defendants, who may have to bear the costs of litigating with Arch twice. Further, Arch would be given “two bites at the apple.” If this Court were to now rule that advancement would be required under the Arch Policy if hereafter sought by the Officer Defendants, Arch would no doubt then seek to litigate coverage under its policy in another forum, and try to use a favorable ruling to avoid the obligation to advance defense costs.

In contrast, Arch would not be prejudiced by a denial of its motion to intervene because it would be able to fully litigate the issue of advancement under the Arch Policy if and when that issue is raised in another proceeding. While Arch argues that Axis cannot adequately represent Arch’s interests (Arch Motion ¶ 19), it does so only with respect to issues under the Arch Policy which, absent Arch’s motion being granted, will not be litigated in this action. Arch cannot and does not argue that Axis is incapable of adequately representing its own interests in opposing advancement under the Axis Policy.

Arch further asserts that it “easily satisfies the requirement . . . that its claim and the existing action share a “common question of law or fact.” (See Arch Motion ¶ 18.) However, Arch itself acknowledges that “Axis and Arch have relied upon different policy provisions in denying coverage” and states that, as a result, different showings will be required in order to obtain advancement. (See *id.* ¶ 19.) While Arch and Axis may share a “common interest” as insurers in opposing advancement motions, such interest does not satisfy the threshold showing required under Rule 24(b) of a common question of law or fact. See *County of Chautauqua v. International Insurance Company*, No. CIV-88-557E, 1989 WL 13461 \*2 (W.D.N.Y. Feb. 15, 1989) (“mutual self-interest” between plaintiff and proposed intervenor in plaintiff succeeding on its claim was not sufficient to satisfy the prerequisites of permissive intervention); *Kheel v. Am. Steamship Owners Mutual Protection & Indemnity Assoc.*, 45 F.R.D. 281, 284 (S.D.N.Y. 1968) (stating that “[t]he mere existence of a third person’s interest in the outcome of pending litigation is insufficient to warrant intervention” and citing to the possibility of creating “complication and confusion” in denying permissive intervention).

Finally, Arch has not cited to a single case granting intervention under facts remotely similar to those presented here. In fact, in two of the three cases cited in Arch’s moving papers, the Second Circuit affirmed the district court decisions *denying* permissive intervention. See *D’Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001); *H.L. Hayden Co. of New York, Inc.*, 797 F.2d at 87, 89. In the third case cited by Arch, *International Design Concepts, LLC v. Saks Inc.*, 486 F. Supp. 2d 229, 235 (S.D.N.Y. 2007), the non-party’s motion under Rule 24(b) to intervene as a party-plaintiff was granted, but the court specifically noted there that “defendants [had] *no objection* to the permissive joinder.” (Emphasis added.) Moreover, the case is not at all

factually on point, as, among other things, the proposed intervenor plaintiff was the licensor of the plaintiff.

### **CONCLUSION**

For all of the foregoing reasons, the Court should exercise its broad discretion and deny Arch's motion to intervene as a counterclaim defendant in the present adversary proceeding against Axis. Specifically, the Officer Defendants respectfully request that the Court: (1) deny Arch permission to intervene as a counterclaim-defendant and reject Arch's pleadings in intervention; (2) reject Arch's memorandum in opposition to the Officer Defendants' Advancement Motion; and (3) disallow Arch from being heard at the August 30, 2007 hearing on the Advancement Motion.

Dated: August 23, 2007

Respectfully submitted,

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A copy of the foregoing has been served by fax, personal delivery, or email, on August 23, 2007, on the attached service list.

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# Exhibit D

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In Re: : 05-60006  
REFCO, LLC, :  
Debtor. :  
-----X  
AXIS REINSURANCE COMPANY, : 07-1712  
Plaintiff, :  
v. : One Bowling Green  
BENNETT, et al., : New York, New York  
Defendants. : August 30, 2007  
-----X

TRANSCRIPT OF HEARING ON MOTIONS  
BEFORE THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

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SOUTHERN DISTRICT OF NEW YORK

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(Appearances continue on next page.)

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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Proceedings recorded by electronic sound recording,  
transcript produced by transcription service

1 (Proceedings began at 10:20 a.m.)

2 THE COURT: Okay. Refco and the Axis Reinsurance  
3 matters.

4 [Pause in the proceedings.]

5 MR. GOLDMAN: Good morning, Your Honor.

6 THE COURT: All right. There are a number of  
7 matters on that generally come under the heading of the Axis  
8 Reinsurance matters.

9 Have the parties discussed any particular order  
10 that they want to proceed in?

11 MR. GOLDMAN: Good morning, Your Honor. Matthew  
12 Goldman, Baker & Hostetler. I will be speaking on behalf of  
13 what we have called the moving defendants, the parties seeking  
14 a preliminary injunction for advancement of defense costs.

15 Yes, I have spoken with Joan Gilbride -- yeah. I  
16 have spoken with Joan Gilbride. I believe at least insofar as  
17 Axis and the other moving defendants are concerned, the  
18 appropriate procedure would be that this Court first determine  
19 whether or not Arch should be permitted to intervene so that we  
20 can determine whether or not they would be heard.

21 THE COURT: Right. I agree with you.

22 MR. GOLDMAN: Our suggestion --

23 THE COURT: I'd go with that first.

24 MR. GOLDMAN: Okay. Thank you, Your Honor. Then  
25 our suggestion would be that we proceed with the motion to

1 advance defense costs, the motion to file by the motions to  
2 dismiss or to stay. And insofar as the lift stay motions are  
3 concerned, there is no objection to lifting the stay to the  
4 extent that it is applicable to deal with the defense cost  
5 issues. That's not in dispute at all. The only thing that is  
6 potentially at issue in the lift stays in my supplemental  
7 motion asking for permission to also enter into settlements.  
8 We can put that at the end because nothing about the lift stay  
9 interferes with this argument.

10 THE COURT: Okay. I appreciate that probably a  
11 fair amount of thought went into that order of proceeding and  
12 perhaps some tactical considerations, too, but it strikes me  
13 given the lack of any opposition, except the limited amount to  
14 the part of the lift stay motion that it ought to be lifted  
15 for all purposes, that I should hear the motion to dismiss  
16 first and then deal with the issue of advancing defense costs,  
17 particularly since the debtor doesn't seem to care about that  
18 and it appears to be no dispute because they haven't taken any  
19 position whatsoever on this and they've not opposed lifting the  
20 stay.

21 MR. GOLDMAN: Your Honor, I didn't actually say  
22 it's that material in that order.

23 THE COURT: Okay.

24 MR. GOLDMAN: So, yeah, if the Court wishes to do  
25 dismissal first, that is fine with us, Your Honor.

1 THE COURT: Okay. That's fine.

2 MR. GOLDMAN: All right. So I think then that  
3 means that we start with intervention?

4 THE COURT: So I need to hear from Arch, then,  
5 first.

6 MR. GOLDMAN: Thank you, Your Honor.

7 MR. STANDISH: Good morning, Your Honor. Daniel  
8 Standish of Wiley Rein on behalf of Arch Insurance Company.

9 Your Honor, we seek to intervene in this case for  
10 the limited purpose of opposing the request for the advancement  
11 of defense costs notwithstanding the existence of a coverage  
12 defense that bars coverage for the claim in its entirety.

13 Arch is in the same tower of insurance as Axis.  
14 Arch has the policy that is ten million dollars excess of 40  
15 million dollars. At this point, the underlying limits have  
16 been depleting rapidly. We understand that the burn rate at  
17 this juncture is about two million dollars a month.

18 The demand is that the officer defendants in this  
19 case have made that Axis pay for their defense fees and costs  
20 on an as-incurred basis notwithstanding the existence of a  
21 threshold defense. That is an issue that will affect Arch, as  
22 well, in two different ways. One, it will affect the amount of  
23 the policy limits that remain under the Arch layer, as well as  
24 affect Arch's rights potentially as a precedential matter if and  
25 when Arch's policy is reached, which at this point given the

1 burn rate at least the amounts incurred would certainly  
2 implicate that level. So for that reason, Arch has a very  
3 strong interest of that particular issue.

4 Arch also feels strongly about intervening in this  
5 case because as Your Honor may recall in June of 2006 Your  
6 Honor gave leave for Arch to file its declaratory judgment  
7 action in New York Supreme Court in order to obtain an  
8 adjudication of the coverage issues. Your Honor found that  
9 Arch would be prejudiced if it were unable to do so.

10 Once we got before Justice Freedman, the officer  
11 defendants who are now demanding that Axis advance defense fees  
12 and costs argued to Justice Freedman that the Arch suit should  
13 be dismissed without prejudice, because it was totally  
14 speculative whether or not the erosion of the underlying layers  
15 would ever occur and Arch's policy would be implicated. And  
16 even if it did implicate Arch's layer, Arch could simply stand  
17 on its denial and refuse to pay, thus directly contrary to the  
18 position that they've now taken before this court in demanding  
19 advancement.

20 So for that reason, we feel that Arch's interest --

21 THE COURT: That wasn't the only reason they  
22 opposed it, right?

23 MR. STANDISH: That was not the only reason.  
24 That's correct, Your Honor. There was also an argument that it  
25 would overlap with the underlying facts at issue in the



1 criminal prosecution going forward.

2 But Justice Freedman specifically did not reach  
3 the issue of whether or not the insurers could be obligated to  
4 include advance defense fees and costs notwithstanding the  
5 existence of a threshold coverage defense.

6 Arch has moved promptly to intervene, Your Honor.  
7 We've briefed this contemporaneously. We filed with our  
8 intervention papers our opposition to the request for  
9 advancement and we don't feel that any of the defendants would  
10 be prejudiced by the intervention. In fact, it would be far  
11 more efficient to adjudicate this issue in the context of the  
12 same proceeding than have it litigated again at some future  
13 juncture against Arch in a separate pleading.

14 So for that reason, Your Honor, we submit that  
15 permissive intervention is appropriate here and should be, Arch  
16 should be permitted to be in for this purpose.

17 THE COURT: But it's not necessarily the same  
18 issue, is it?

19 MR. STANDISH: With respect to the primary policy  
20 language it is, Your Honor. Both the Axis policy and the Arch  
21 policy incorporate by reference the language on which the  
22 officers are relying for the advancement of defense fees and  
23 costs. They're focusing in the primary policy in condition (d)  
24 that says that the insurer shall advance the covered advanced  
25 costs on an as-incurred basis. The dispute over whether or not

1 the advancement of covered advanced costs is required when the  
2 policy excludes the defense costs is the same issue as to both  
3 Axis and Arch.

4 The only distinction is in the policy provisions  
5 on which Arch and Axis are relying for the denial of coverage.  
6 Arch has its own prior knowledge exclusion in its policy and  
7 there is no dispute in that case that that exclusion exists and  
8 that it applies. There's a dispute in the Axis case over  
9 whether or not the exclusion actually is in the policy. Axis  
10 obviously takes the position that it is, but that dispute  
11 doesn't exist as to Arch.

12 But with respect to the primary policy language,  
13 the question of whether advancement of "covered defense costs"  
14 means you have to advance uncovered defense costs is precisely  
15 the same.

16 THE COURT: Okay.

17 MR. STANDISH: Thank you, Your Honor.

18 MR. KLINE: Good morning, Your Honor. Ivan Kline  
19 from Friedman & Wittenstein in New York.

20 We represent in this action two of the officer  
21 defendants, William Sexton and Sherer, arguing against the  
22 intervention on behalf of them as well as defendants Klejna,  
23 Murphy and Silverman, who are the five sort of moving insureds  
24 on the advancement motion.

25 And even assuming there is some common question of

1 law, this is clearly a case where the Court should exercise its  
2 discretion to deny the motion. This case is about coverage  
3 under the Axis policy, not the Arch policy. We've asserted a  
4 counterclaim against Axis; under the Axis policy we have not.  
5 They are not mentioned or in any way involved the Arch policies  
6 and we've made an advancement motion solely as against Axis  
7 because its policy is now the one that's up, so to speak.

8 We have no claims against Arch. We haven't asked  
9 for advancement against Arch. Arch wants to litigate not just  
10 advancement in the abstract. It specifically says it wants to  
11 intervene to litigate whether the Arch policy requires Arch to  
12 advance defense costs, but nobody's made that request, so I  
13 don't know against whom they're going to litigate that, because  
14 we haven't made the motion. So procedurally there is a flaw in  
15 what they seek to do, because nobody is seeking relief against  
16 Arch, so they can't really be heard on an issue of when their  
17 policy requires advancement of defense costs. In fact, they  
18 rely very clearly on a specific provision of their policy,  
19 which we have not briefed, we have not addressed because we  
20 have no claims against them.

21 There's also a procedural flaw which their own  
22 proposed opposition brief sets out and that they didn't address  
23 in their reply when we pointed it out. They state in their  
24 proposed brief and in opposing advancement that in order for  
25 there to be an advancement motion, there has to be an

1 underlying claim to support the request for relief, which  
2 advancement would go with. For example, the five moving  
3 insureds have counterclaims against Axis and it's those  
4 counterclaims with declaratory injunctive relief that support  
5 our request for advancement.

6 Arch points that out because it says others aren't  
7 really empowered to advancement anyway, but then it still seeks  
8 to adjudicate advancement under its policy just by itself  
9 without being hooked on in any way to any claim by or against  
10 it. And it's created its own procedural conundrum. It  
11 recognized it can't come in here to seek to intervene and  
12 litigate coverage under the policy, because that would be  
13 barred by Justice Freedman's order. So instead they're seeking  
14 just to litigate this advancement issue, but you can't really  
15 litigate that in the abstract by itself without the "coverage"  
16 under the policy also being in dispute. They themselves state  
17 that in their proposed opposition brief.

18 In terms of the other procedural flaw would be if  
19 Your Honor granted that intervention, you know, then what? We  
20 haven't made a motion against Arch, so how can Your Honor  
21 adjudicate whether advancement is required under the Arch  
22 policy when we haven't briefed it, and we have no intention at  
23 this point of briefing it, and may never have to brief it.

24 And in terms of judicial efficiency, some court is  
25 going to have the coverage dispute against Arch unless it, you

1 know, goes away due to one cause or another. It's not going to  
2 be this court, because by their own statement they can't come in  
3 here now to seek to adjudicate coverage. So to have this court  
4 somehow rule in the abstract on advancement under the Arch  
5 policy simply makes no sense when some other court will have  
6 the coverage issue. And in both cases they're going to be  
7 raising the prior knowledge exclusion in their policy as the  
8 key provision to look at.

9 Now, clearly for purposes of efficiency, if we  
10 ever want to seek advancement under the Arch policy, we'll have  
11 to do something. We'll have to do it in some court where  
12 coverage is also at issue. And in terms of what Arch's counsel  
13 said we're already inconsistent positions, advancement was not  
14 an issue before this.

15 THE COURT: Oh, you don't have to get into that  
16 one.

17 MR. KLINE: All right. I think that covers the  
18 points I want to make, unless Your Honor has some further  
19 questions.

20 THE COURT: Okay. Why isn't counsel right that, as  
21 you said, the common issue here is coverage under the primary  
22 policy and coverage was raised in state court so why isn't this  
23 really an end run around the state court decision?

24 MR. KLINE: There are different coverage issues.  
25 This coverage issue is not reached by Justice Freedman. At

1 pages 3 to 4 of the rule --

2 THE COURT: But she said it was premature and this  
3 shouldn't be happening now.

4 MR. KLINE: She found that the litigation of the  
5 application of the Arch exclusion was premature. What Justice  
6 Freedman did not reach was the question that is being presented  
7 by the motion for preliminary injunction to be argued this  
8 morning of whether or not under language of the primary policy  
9 and applicable law an insurance company that has denied,  
10 regardless of the basis, can't -- has to be obligated to advance  
11 defense fees and costs notwithstanding the existence of that  
12 coverage defense when the demand is made and has to instead  
13 litigate issues of coverage all the way to a conclusion and  
14 then try to recoup those amounts.

15 That limited question is the question on which  
16 Arch seeks to intervene here, and that's the question that's  
17 presented by the motion for preliminary judgment. Regardless  
18 of what the specific coverage defense is, the common issue is  
19 whether or not given the language of the primary policy that  
20 only requires the advancement of covered defense costs, the  
21 Court should turn a blind eye to that language and enforce the  
22 advancement of those defense fees and costs anyway until there's  
23 some final adjudication in the coverage litigation.

24 THE COURT: But I mean, you're using the same term,  
25 "covered," "coverage." It's the same term and it's the same

1 analysis, isn't it, that she went through?

2 MR. KLINE: No, Your Honor. The analysis --

3 THE COURT: I mean, I understand that she had an  
4 alternative basis for her ruling, so one of her bases -- we  
5 went through this point on coverage.

6 MR. KLINE: Your Honor, Justice Freedman did not  
7 look at the advancement language in the policy. In the Supreme  
8 Court, the director defendants actually asked Justice Freedman  
9 to enter an order for the advancement of defense fees and costs  
10 until final adjudication of the coverage issue. And in her  
11 opinion she expressly did not reach that issue, so the specific  
12 issue on which we seek to intervene in this matter were reached  
13 by Justice Freedman.

14 THE COURT: They're not asking for it here.

15 MR. KLINE: They are, Your Honor, in their  
16 preliminary injunction papers.

17 THE COURT: Not from Arch.

18 MR. KLINE: They are asking it from Axis and it  
19 will be the same issue under the primary policy language  
20 because both Arch and Axis incorporate by reference conditions  
21 D-2 and D-3, which are at issue in this case.

22 Because of that overlap Arch has an interest in  
23 the income. I have no doubt that depending on the outcome here  
24 one side or the other will be able to tout that, if and when  
25 the Arch layer is ever reached. And, given the burn rate on

1 defense expenses and the demands for settlement that are now  
2 being bandied about, I have no doubt that the existence of  
3 coverage under the Arch policy will be squarely at issue in the  
4 very near future based on the communications that we're  
5 receiving. And at that point, we're going to have to deal with  
6 this issue. It's much more efficient to deal with the issue in  
7 one proceeding when that same language is at issue on that  
8 issue.

9 THE COURT: Even though you have different  
10 language in your own policy from --

11 MR. KLINE: The exclusionary language differs.  
12 That's correct, Your Honor.

13 THE COURT: Okay.

14 MR. STANDISH: Your Honor, I just want to  
15 reiterate. Their motion very clearly says they seek to  
16 intervene to litigate the issue whether the Arch policy  
17 requires Arch to advance defense costs. They're not coming in  
18 seeking to just talk about whether in general we can get  
19 advancement or whether under the Axis policy we're entitled to  
20 advancement and question whether they even have standing to do  
21 that.

22 In that sense, they're like any insurer that may be  
23 out there that may have language similar to the primary policy  
24 in any case. You wouldn't allow that insurer to come and  
25 intervene in this case. And here, they've already been told by



1 Justice Freedman they really can't do what they're now seeking  
2 to do. And if you look at their proposed brief, it's full of  
3 references that their policy, their prior knowledge to  
4 exclusion: they're seeking to argue the applicability of that  
5 exclusion albeit to try to avoid advancement as against them,  
6 which has not been sought.

7 THE COURT: Okay. Arch Insurance Company has  
8 moved for permission to intervene under Rule 24(b) incorporated  
9 by Bankruptcy Rule 7024 in this declaratory judgment litigation  
10 between a lower tier insurer, Axis Reinsurance Company and  
11 various defendants, former directors and officers of Refco,  
12 Inc. The movant acknowledges that there's not a complete  
13 overlap of the issues in the Axis Reinsurance litigation and  
14 the litigation that it would want to pursue if it were  
15 permitted to intervene, which would be to seek a declaratory  
16 judgment that it -- that is, Arch -- would not be obligated  
17 under the Arch policy to advance defense costs to the directors  
18 and officer beneficiaries of Refco's insurance with it. That is  
19 because exclusions relied upon by Arch in its policy differ  
20 from exclusions relied upon by Axis.

21 The common issue that Arch relies upon for  
22 purposes of Rule 24(b) is language in the first-tier policy  
23 pertaining to covered claims as they relate to defense costs,  
24 among others -- or "losses," as defined in the policy -- which  
25 is a link in the logical chain that if broken might prevent

1 Arch from pursuing certain of its arguments, if not all of  
2 them, that it does not have to advance coverage. No  
3 beneficiary of the policy has actually apparently at this time  
4 sought to compel Arch to advance coverage. I would also note  
5 that the debtor in this case has appeared to be completely  
6 neutral on the issue and is not a party to this litigation and  
7 has taken no position whatsoever.

8           It appears to me that to the extent that it is a  
9 common issue of law (and fact to the extent there's any factual  
10 issue) in interpreting the relevant insurance policies, it  
11 would not be a proper exercise of my discretion to permit Arch  
12 to intervene. As is clear from the briefing on the motions  
13 before the Court today in connection with the Axis Reinsurance  
14 matter, first, the actual language of the policy is important.

15       Second, issues of ripeness or whether the Axis litigation is  
16 premature are important and are to some extent fact driven, in  
17 particular driven by the claimed exigencies faced by the policy  
18 beneficiaries, the officers and officers who have felt the  
19 pinch of not getting the coverage at that tier.

20           To my mind, it would therefore be inefficient to  
21 include Arch in this litigation at this time, and it would  
22 instead be efficient to pursue the issues that are truly before  
23 the Court in this litigation: that is, the issues involving  
24 Axis and the directors and officers' claims against Axis and not  
25 use this litigation as a funnel to invite any prospective

1 insurer to join some sort of massive proceeding.

2 That's compounded by two other considerations.

3 First, I note that Arch pursued in New York State court  
4 declaratory judgment litigation regarding the terms of its own  
5 policy and "coverage" under that policy, and the state court  
6 ruled that that litigation was premature. It seems to me, in  
7 large extent this is an end run around that ruling -- that,  
8 i.e., Arch's request to intervene here would be an end run  
9 around that ruling -- and at a minimum that if I permitted Arch  
10 to intervene, we would be frequently interrupted in litigation  
11 by considerations of whether what Arch is in particular seeking  
12 at that particular moment (if I permitted it to intervene)  
13 would be an end run around that order or whether the order  
14 would be binding on it.

15 Finally, as I noted at the pretrial conference on  
16 this matter, I continue to have some concern, given (a) that  
17 Refco's plan is confirmed and effective and substantially  
18 consummated and (b) that Refco, the debtor, has no  
19 participation in this litigation at all, as to the extent of my  
20 jurisdiction over it. And in light of all the other factors  
21 that I've already mentioned arguing that I should not exercise  
22 my discretion to further expand this adversary proceeding to  
23 involve other insurers, it seems to me that Arch's issues, if  
24 they're to be brought at all, should be brought in another court  
25 when they become ripe.

1           So I'm not sure which of these counsel here took  
2 the lead on this matter, but certainly you could submit an  
3 order consistent with my ruling denying the motion.

4           I would ask you just to send a -- well, you can  
5 work it out among yourselves. I'd just ask one of you to send a  
6 copy to Arch's counsel. You don't have to settle it on him, but  
7 just send him a copy at the same time you're sending it to  
8 chambers, or as a courtesy you may want to send it to him a day  
9 before, so he can determine that it's consistent with my ruling.

10

11           MR. KLINE: Okay. No problem.

12           THE COURT: Okay. Okay. All right. So that  
13 leads to the motion to dismiss.

14           [Pause in the proceedings.]

15           MR. WALSH: Michael Walsh from Weil, Gotshal &  
16 Manges on behalf of all of what we call the director  
17 defendants. That's Brightman, Ganter, Harkins, Jeakel, Lee,  
18 O'Kelly and Schoen. It seems like Your Honor is very familiar  
19 with the background here, but I can just run through the  
20 structure if that would be helpful.

21           THE COURT: Okay.

22           MR. WALSH: Refco arranged the known insurance in  
23 the amount of 70 million dollars. That consists of a primary  
24 policy and five excess policies. Axis provides a third tier in  
25 that tower, that is, the second excess policy and all of the

# Exhibit E

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

ARCH INSURANCE COMPANY,

Plaintiff,

v.

JOHN D. AGOGLIA, PHILLIP R.  
BENNETT, LEO R. BREITMAN, EDWIN  
L. COX, SUKHMEET DHILLON,  
THOMAS H. DITTMER, NATHAN  
GANTCHER, STEPHEN GRADY, TONE  
GRANT, THOMAS HACKL, DAVID V.  
HARKINS, SCOTT L. JAECKEL,  
DENNIS A. KLEJNA, THOMAS H. LEE,  
ERIC G. LIPOFF, SANTO C. MAGGIO,  
PETER MCCARTHY, JOSEPH  
MURPHY, FRANK MUTTERER,  
RICHARD N. OUTRIDGE, RONALD L.  
O'KELLEY, SCOTT A. SCHOEN,  
WILLIAM M. SEXTON, GERALD  
SHERER, PHILIP SILVERMAN and  
ROBERT C. TROSTEN,

Defendants.

Index No.: 08-600029

**FIRST AMENDED COMPLAINT  
FOR DECLARATORY JUDGMENT**

NEW YORK  
COUNTY CLERKS OFFICE  
FEB 22 2008  
NOT COMPARED  
WITH COPY FILE

In support of its first amended complaint against defendants, plaintiff Arch Insurance Company ("Arch") alleges as follows:

**INTRODUCTION**

1. Arch issued an excess directors, officers and corporate liability insurance policy to Refco, Inc. ("Refco") for the period from August 11, 2005 to August 11, 2006 (the "Arch Policy"). Since August 11, 2005, numerous lawsuits and governmental and/or regulatory investigations (the "Underlying Matters") involving certain individuals insured under the Arch Policy have been instituted and various of those individuals have tendered the Underlying

Matters to Arch for coverage under the Arch Policy. Arch brings this action against the defendants named herein ("Defendants") to seek a declaration that the Arch Policy affords no coverage for the Defendants in connection with the Underlying Matters.

2. This is the second lawsuit that Arch has filed in this court for a declaration regarding the parties' rights and responsibilities under the Arch Policy. The first lawsuit (Index No. 600805/06) was dismissed without prejudice by Justice Freedman in an opinion dated February 20, 2007 based on two factors that no longer exist. First, the Arch Policy contains a limit of liability that is \$10 million excess of \$40 million in underlying limits, and Justice Freedman ruled that it was entirely speculative whether the Underlying Matters would ever generate losses that would implicate the Arch Policy. Since that ruling, the limits of the underlying policies have been depleted at a voracious pace. As of the filing of this first amended complaint, the underlying insurers have advanced approximately \$27.5 million in attorneys' fees and costs, and the bevy of law firms representing the individual insureds is generating over \$2 million per month in additional fees and costs. Thus, contrary to the position that the individual insureds advanced before this Court when Arch filed its first action, it is far from speculative whether, setting aside the dispositive coverage issues that Arch outlines in this complaint based on the unique terms of its Policy, the Arch limit will be implicated.

3. Justice Freedman also held that Arch could not proceed with the first action because the question whether any insured had knowledge of facts or circumstances that might give rise to a claim as of the Arch Policy inception date – key issue for purposes of the exclusions that form the basis for Arch's denial of coverage – would overlap with issues that were not yet adjudicated in the Underlying Matters. That impediment no longer exists. Beginning on December 19, 2007, three former executives of Refco – namely, its former Chairman, President and Chief

Executive Officer, Phillip R. Bennett, its former Chief Financial Officer, Robert C. Trosten, and its former Executive Vice President, Santo C. Maggio – pleaded guilty to a number of federal charges, including conspiracy, securities, wire and bank fraud, making false filings with the SEC, making false statements to Refco’s auditors and money laundering. In connection with their guilty pleas, Bennett, Trosten and Maggio, all of whom are insureds under the Arch Policy, each admitted that he knew of and participated in the wrongdoing that is at the heart of the allegations in the Underlying Matters. These guilty pleas and related admissions of fact, which establish that Bennett, Trosten and Maggio knew of the wrongdoing at the time of the inception of the Arch Policy, trigger the applicability of the exclusions identified in this amended complaint as to all of the Defendants in this action with respect to the Underlying Matters without regard to the outcome of any unresolved proceeding involving any other Defendant. Thus, the second ground for the dismissal of Arch’s first action no longer exists.

#### **JURISDICTION AND VENUE**

4. This Court has jurisdiction to resolve an actual controversy between Arch and the Defendants pursuant to the New York Declaratory Judgment Act, CPLR § 3001.

5. Personal jurisdiction over Defendants is proper pursuant to CPLR § 301 and § 302. Defendants possess sufficient minimum contacts with the state of New York to render the exercise of jurisdiction by a New York court permissible under traditional notions of fair play and substantial justice. Defendants were directors or officers of Refco, a corporation with its principal place of business in New York.<sup>1</sup> As directors and/or officers of Refco, Defendants

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<sup>1</sup> “Refco”, as used herein, refers to Refco, Inc., the publicly-traded company formed in connection with an August 2005 initial public offering, Refco Group Ltd., LLC (“RGL”), the company through which Refco, Inc.’s business primarily was conducted prior to the offering, and the subsidiaries of Refco, Inc. and Refco Group Ltd., LLC.



transacted business in the state of New York. In addition, some or all of Defendants seek coverage under the Arch Policy for the Underlying Matters. Accordingly, Defendants have an ongoing contractual relationship with Arch, a corporation with its principal place of business in New York. Finally, most of the lawsuits comprising the Underlying Matters were filed in the federal courts located in New York. These lawsuits allege that Defendants committed acts in the state of New York and/or acts outside the state of New York that could reasonably be expected to have consequences in the state of New York.

6. Venue is proper in this County under CPLR § 503 because Arch has its principal place of business in this County.

#### **PARTIES**

7. Arch is an insurance company that is organized and exists pursuant to the laws of the state of Missouri. Arch has its principal place of business in New York County, New York.

8. Defendant John D. Agoglia (“Agoglia”) served as a senior vice president at Refco Securities, LLC, a subsidiary of Refco, Inc., at times relevant to this action. Upon information and belief, Agoglia is a citizen of New York.

9. Defendant Phillip R. Bennett (“Bennett”) served as the Chairman, President and Chief Executive Officer of Refco until October 2005, when he took a leave of absence at the request of the Refco board of directors. Upon information and belief, Bennett is a citizen of New Jersey.

10. Defendant Leo R. Breitman (“Breitman”) served as a director of Refco at times relevant to this action. Upon information and belief, Breitman is a citizen of Florida.

11. Defendant Edwin L. Cox (“Cox”) served as a director of Refco Group Ltd., LLC at times relevant to this action. Upon information and belief, Cox is a citizen of Texas.

12. Defendant Sukhmeet Dhillon (“Dhillon”) served as Executive Vice President of Refco Group Ltd., LLC and as Executive Vice President of the entity that became Refco LLC, during times relevant to this complaint. Upon information and belief, Dhillon is a citizen of California.

13. Thomas H. Dittmer (“Dittmer”) served as Chairman and CEO of Refco during times relevant to this action. Upon information and belief, Dittmer is a citizen of Illinois.

14. Defendant Nathan Gantcher (“Gantcher”) served as a director of Refco at times relevant to this action. Upon information and belief, Gantcher is a citizen of New York.

15. Defendant Stephen Grady (“Grady”) was COO of Refco Global Futures LLC, a Refco subsidiary, during times relevant to this action. Upon information and belief, Grady is a citizen of New Jersey.

16. Defendant Tone Grant (“Grant”) served as President of Refco Group Ltd., LLC at times relevant to this action. Upon information and belief, Grant is a citizen of Illinois.

17. Defendant Thomas Hackl (“Hackl”) served as Executive Vice President of RGL at times relevant to this action. Upon information and belief, Hackl is a citizen of Geneva, Switzerland.

18. Defendant David V. Harkins (“Harkins”) served as a Director of Refco at times relevant to this action. Upon information and belief, Harkins is a citizen of Massachusetts.

19. Defendant Scott L. Jaeckel (“Jaeckel”) served as a Director of Refco at times relevant to this action. Upon information and belief, Jaeckel is a citizen of Massachusetts.

20. Defendant Dennis A. Klejna (“Klejna”) served as Executive Vice President and General Counsel of Refco Group Ltd., LLC at times relevant to this action. Upon information and belief, Klejna is a citizen of Washington, D.C.

21. Defendant Thomas H. Lee ("Lee") served as a Director of Refco at times relevant to this action. Upon information and belief, Lee is a citizen of New York.

22. Defendant Eric G. Lipoff ("Lipoff") served as Executive Vice President of a Refco subsidiary at times relevant to this action. Upon information and belief, Lipoff is a citizen of California.

23. Defendant Santo C. Maggio ("Maggio") served as an Executive Vice President of Refco and as President and Chief Executive Officer of Refco Securities, LLC and Refco Capital Markets, Ltd. at times relevant to this action. Upon information and belief, Maggio is a citizen of Florida.

24. Defendant Peter McCarthy ("McCarthy") served as Executive Vice-President of Refco Securities at times relevant to this action. Upon information and belief, McCarthy is a citizen of New Jersey.

25. Defendant Joseph Murphy ("Murphy") served as President of Refco from October 2005 to November 28, 2005, when he resigned. Murphy also served as Chief Executive Officer of Refco Global Futures and President of Refco, LLC at times relevant to this action. Upon information and belief, Murphy is a citizen of New Jersey.

26. Defendant Frank Mutterer ("Mutterer") served as Controller of Refco Group Ltd., LLC, during times relevant to this action. Upon information and belief, Mutterer is a citizen of New Jersey.

27. Defendant Richard N. Outridge ("Outridge") served as CFO of Refco Capital Management at times relevant to this action. Upon information and belief, Outridge is a citizen of Pennsylvania.

28. Defendant Ronald L. O'Kelley ("O'Kelley") served as a Director of Refco at times relevant to this action. Upon information and belief, O'Kelley is a citizen of Florida.

29. Defendant Scott A. Schoen ("Schoen") served as a Director of Refco at times relevant to this action. Upon information and belief, Schoen is a citizen of Massachusetts.

30. Defendant William M. Sexton ("Sexton") served as Executive Vice President and Chief Operating Officer of Refco at times relevant to this action. Upon information and belief, Sexton is a citizen of Iowa.

31. Defendant Gerald Sherer ("Sherer") served as Executive Vice President and Chief Financial Officer of Refco at times relevant to this action. Upon information and belief, Sherer is a citizen of New York.

32. Defendant Philip Silverman ("Silverman") served as Secretary of Refco at times relevant to this action. Upon information and belief, Silverman is a citizen of New Jersey.

33. Robert C. Trosten ("Trosten") served as Executive Vice President and Chief Financial Officer of Refco Group Ltd., LLC at times relevant to this action. Upon information and belief, Trosten is a citizen of New Jersey.

### **FACTUAL ALLEGATIONS**

#### **The Arch Policy**

34. The Arch Policy is an excess directors, officers and corporate liability policy. It has a policy period of August 11, 2005 to August 11, 2006 and a limit of liability of \$10 million excess of \$40 million in underlying insurance. A copy of the Arch Policy is attached as Exhibit A.

35. Various other insurers issued underlying insurance policies to Refco. U.S. Specialty Insurance Company issued a primary policy with limits of \$10 million excess of applicable retentions (the "Primary Policy"). A copy of the Primary Policy is attached as Exhibit B. Lexington Insurance Company issued a first excess policy with limits of \$7.5 million excess of

\$10 million (the “Lexington Policy”). A copy of the Lexington Policy is attached as Exhibit C. Axis Reinsurance Company issued a second excess policy with limits of \$10 million excess of \$17.5 million (the “Axis Policy”). A copy of the Axis Policy is attached as Exhibit D. Allied World Assurance Company issued a third excess policy with limits of \$12.5 million excess of \$27.5 million (the “AWAC Policy”). A copy of the AWAC Policy is attached as Exhibit E. Each of the underlying policies has a policy period of August 11, 2005 to August 11, 2006.

36. In general, the Arch Policy applies in conformance with the terms and conditions of the Primary Policy and in conformance with the terms and conditions in the Arch Policy or any other underlying insurance “further limiting or restricting coverage.” Arch Policy, Section I.C. The Arch Policy provides that “[i]n no event shall this Policy grant broader coverage than that provided by the most restrictive policy included in the Underlying Insurance.” *Id.* The Arch Policy provides that coverage thereunder applies only after exhaustion of the **Underlying Limit** solely as a result of actual payment under the **Underlying Insurance** in connection with **Claim(s)**. *Id.*, Section I.B.<sup>2</sup>

37. Subject to all of its terms and conditions, the Arch Policy affords five types of specified coverage. First, the Arch Policy affords specified coverage to **Insured Persons** for “**Loss** arising from **Claims** first made during the **Policy Period** . . . for **Wrongful Acts**, except when and to the extent that the **Company** has paid such **Loss** to or on behalf of the **Insured Persons** as indemnification or advancement.” Primary Policy, Insuring Agreement (A). **Insured Persons** is defined in relevant part as “any past, present or future director or officer of

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<sup>2</sup> Policy language appearing herein in bold typeface is defined in the policy being quoted, and appears in bold typeface in that policy.

the **Company . . .**” Primary Policy, Definition F(1). The **“Company”** is Refco Inc. and its subsidiaries. Primary Policy, Definitions (C), (H), (O), Declarations Item 1.

38. Second, subject to all of its terms and conditions, the Arch Policy affords specified coverage to the Company for **“Loss arising from . . . Claims first made during the Policy Period . . . against the Insured Persons for Wrongful Acts, if the Company has paid such Loss to or on behalf of the Insured Persons as indemnification or advancement.”** Primary Policy, Insuring Agreement (B)(1).

39. Third, subject to all of its terms and conditions, the Arch Policy affords specified coverage to the Company for **“Loss arising from Securities Claims first made during the Policy Period . . . against the Company for Wrongful Acts.”** Primary Policy, Insuring Agreement (B)(2).

40. Fourth, subject to all of its terms and conditions, the Arch Policy affords specified coverage to the **“Controlling Shareholder,”** defined as Bennett, for **“Loss arising from a Securities Claim first made during the Policy Period . . . against such Controlling Shareholder for Wrongful Acts, provided, that one or more Insured Persons and/or the Company are and remain co-defendants in such Securities Claim along with such Controlling Shareholder.”** Primary Policy, Endorsement No. 15.

41. Fifth, subject to all of its terms and conditions, the Arch Policy affords specified coverage to the Company for **“all Derivative Demand Investigation Costs incurred by the Company as a result of a Derivative Demand first received by the Company’s Board of Directors and reported in writing to the Insurer during the Policy Period . . . up to the amount of the Derivative Demand Investigation Costs Sub-Limit”** of \$250,000. Primary Policy, Endorsement No. 11.

42. The AWAC Policy contains the following provision: “It is hereby understood and agreed that the **Insurer** shall not be liable for **Loss** in connection with any claim or claims made against the **Insureds** alleging, arising out of, based upon, in consequence of, or attributable to facts or circumstances of which any Insured had knowledge as of inception and (i) which a reasonable person would suppose might afford valid grounds for a claim which would fall within the scope of the coverage hereunder; or (ii) which indicate the probability of any such claim.” AWAC Policy, Endorsement No. 3 (“AWAC Prior Knowledge Exclusion”).

43. The Arch Policy contains the following provision: “If any **Insured** as of August 11, 2005 has any knowledge of or information concerning any act, error, omission, fact, matter or circumstance that might give rise to a **Claim** under this Policy, the **Excess Insurer** shall not be liable to make any payment under this Policy as a result of a **Claim** arising out of, based upon or attributable to any such act, error, omission, fact, matter or circumstance.” Arch Policy, Endorsement No. 4 (the “Arch Prior Knowledge or Information Exclusion”).

44. The Arch Policy defines **Insured(s)** as “any person(s) or entity(ies) that are entitled to coverage under the **Followed Policy** at its inception.” Arch Policy, § III.B. The “**Followed Policy**” is the Primary Policy. Arch Policy, § III.C.; Declarations, Item 4.

45. The Arch Policy and underlying insurance policies contain other terms, conditions and limitations that may ultimately be implicated in this action.

46. Defense Costs have been advanced to certain Defendants under the Primary Policy, the Lexington Policy and the Axis Policy.<sup>3</sup> As of the filing of this first amended complaint, the

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<sup>3</sup> The coverage defenses that Arch advances in this action are unique to the Arch Policy; thus, the fact that U.S. Specialty and Lexington advanced fees and costs has no bearing on the coverage issues presented in this case. Axis was ordered by the Refco bankruptcy court to advance fees and costs despite its denial of coverage based on its unique policy provisions and



advancement of defense costs has exhausted the \$10 million limit of the Primary Policy, the \$7.5 million limit of the Lexington Policy, and the \$10 million limit of the Axis Policy. The law firms representing the defendants in the Underlying Matters are currently generating attorneys' fees and costs in the vicinity of \$2 million *per month*. Thus, it is far from conjectural that the Arch Policy limits will be implicated unless this Court promptly adjudicates the coverage issues presented in this case.

**The Events at Refco**

47. The Arch Policy inception on August 11, 2005. On the same day, Refco conducted its initial public offering.

48. On October 10, 2005, Refco issued a press release. The press release announced that the Company had been carrying an undisclosed receivable of \$430 million from an entity controlled by Bennett. Refco stated that "[b]ased on the results of the review to date, the Company believes that the receivable was the result of the assumption by an entity controlled by Mr. Bennett of certain historical obligations owed by unrelated third parties to the Company, which may have been uncollectible." Moreover, Refco stated that although the receivable "was reflected on the Company's prior period financials, as well as on the Company's May 31, 2005 balance sheet," the receivable "was not shown as a related party transaction in any such financials. For that reason, and after consultation by the Audit Committee with the Company's independent accountants, the Company determined, on October 9, 2005, that its financial statements, as of, and for the periods ended, February 28, 2002, February 28, 2003, February 28,

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contrary to the language in the operative policies. Axis has appealed that order to the United States District Court for the Southern District of New York.



2004, February 28, 2005, and May 31, 2005, taken as a whole, for each of Refco Inc., Refco Group Ltd., LLC and Refco Finance, Inc. should no longer be relied upon.”

49. On October 11, 2005, Refco issued a second press release. The press release announced that Bennett had repaid the \$430 million receivable in full. The press release also provided further information on the nature of the receivable: “Based on the results of the internal investigation to date, the Company believes that the receivable consisted in major part of uncollectible historical obligations owed by unrelated third parties to the Company, that arose as far back as at least 1998. These obligations were transferred periodically to the entity controlled by Mr. Bennett, and the Company’s books and records then reflected a receivable from that entity, rather than a receivable from the originating accounts. The fact that the receivable was from a company controlled by Mr. Bennett was hidden at the end of quarterly and annual reporting periods by reason of transfers to a third party customer account that we currently believe is unaffiliated with Mr. Bennett or anyone else at the Company.”

50. On October 17, 2005, Refco and certain of its unregulated subsidiaries filed for Chapter 11 bankruptcy protection.

51. On January 16, 2007, a federal grand jury returned a third superseding indictment against Bennett, Trosten and Grant (the “S3 Indictment”). The S3 Indictment charged Bennett, Trosten and Grant with securities fraud, conspiracy to commit securities fraud, wire fraud, bank fraud and money laundering. The S3 Indictment also charged Bennett with making false filings with the SEC and making false statements to Refco’s auditors. A copy of the S3 Indictment is attached hereto as Exhibit F.

52. On February 15, 2008, Bennett, who is an **Insured** under the Arch Policy, pleaded guilty to all charges against him in the S3 Indictment. Five days later, on February 20, 2008,

Trosten, who also is an **Insured** under the Arch Policy, similarly pleaded guilty to charges of conspiracy, securities, wire and bank fraud and money laundering.

53. The S3 Indictment charged that, beginning in the mid 1990's, Bennett, Trosten and their co-conspirators engaged in a scheme to mask the true financial performance of Refco. Specifically,

[s]tarting at least as early as the mid 1990s, BENNETT and GRANT schemed to hide the true financial health of Refco from its banks, counterparties, auditors, and investors. Starting at least as early as the late 1990s, BENNETT and GRANT embarked on a strategy to mask the true performance of Refco's business in order to sell the company for their own benefit and that of Refco's other owners. To that end, over the ensuing years, BENNETT, TROSTEN, GRANT and others known and unknown systematically (1) covered up both Refco's own losses and customer losses for which Refco became responsible; (2) moved Refco operating expenses off the company's books; and (3) padded Refco's revenues, all in an effort to mislead Refco's banks, counterparties, auditors and investors, with the goals of keeping Refco in business and then selling it for the maximum benefit to its owners and senior management.

S3 Indictment, ¶ 7.

54. According to the S3 Indictment, in furtherance of the scheme, Bennett, Trosten and their co-conspirators made and caused Refco and others on its behalf to make false and fraudulent statements to Refco's banks, counterparties, customers, auditors and investors, and to create false audited financial statements and false public filings with the SEC.

55. The S3 Indictment charged that the scheme permitted Refco to engage in, among other things, Refco's August 2005 initial public offering of stock, in which the public purchased approximately \$583 million of Refco common stock based on a false and fraudulent registration statement. S3 Indictment, ¶ 8.

56. According to the S3 Indictment, the scheme was hatched in 1997, when Refco directly and indirectly incurred a series of substantial trading losses that threatened the continued

viability of its business. S3 Indictment, ¶ 9. In response to those losses, Bennett, Trosten and others moved losses and expenses out of Refco and into Refco Group Holdings, Inc. (“RGHI”), an entity that owned Refco and that was owned by, among others, Bennett and Grant, in an effort to mask Refco’s financial condition. This strategy increased the debt owed by RGHI to Refco (the “RGHI Receivable”), which ultimately grew to over \$1 billion. *Id.*

57. The S3 Indictment charged that, beginning as early as February 1998, Bennett and others directed a series of transactions every year designed to hide the “huge and growing” RGHI Receivable from, among others, Refco’s auditors, by temporarily paying down all or part of the RGHI Receivable over Refco’s fiscal year-end and replacing it with a receivable from one or more other entities not related to Bennett or Refco. S3 Indictment at ¶ 21. Bennett and others caused this cover-up to occur “at every fiscal year-end from at least the fiscal year-end on February 28, 1998 through the fiscal year-end on February 29, 2004.” *Id.* Beginning in 2004, Bennett and others began causing these cover-up transactions to occur at the ends of Refco’s quarterly reporting periods. *Id.* at ¶ 46.

58. The S3 Indictment further charged that Bennett, Trosten and others participated in a scheme to defraud participants in the 2004 leveraged buyout of Refco, which was led by private equity fund Thomas H. Lee Partners, by misleading the fund and purchasers of the \$600 million in notes and \$800 million in bank debt about the true financial health of Refco. S3 Indictment, ¶ 34.

59. Based on these and other allegations, the S3 Indictment charged Bennett as follows:

Count	Charge
1	Conspiracy to commit securities fraud, wire fraud, to make false filings with the SEC, to make material misstatements to auditors, bank fraud and money laundering

Count	Charge
2	Securities fraud in connection with the sale of 9% Senior Subordinated Notes due 2012
3	Securities fraud in connection with the purchase and sale of Refco common stock
4	False filing with the SEC in connection with the filing of Refco's Form 10-K under the Exchange of 1934 on July 19, 2005
5, 6	False filing with the SEC in connection with the filing of certain registration statements under the Securities Act of 1933 on April 6, 2005 and August 8, 2005
7 – 13	Wire fraud in connection with certain electronic communications between June 22, 2004 and August 5, 2005, including the transmission of Refco's Form 10-K on July 19, 2005 and its registration statements on April 6, 2005 and August 8, 2005
14	Material misstatements to auditors
15	Bank fraud in connection with the 2004 leverage buyout transaction
16 – 20	Money laundering in connection with proceeds of the 2004 leverage buyout transaction

60. On February 15, 2008, Bennett pleaded guilty to all twenty counts against him in the S3 Indictment. A copy of the transcript of the hearing ("2/15 Tr.") is attached hereto as Exhibit G. During the hearing at which Bennett pleaded guilty, the following exchange occurred between the Court and Bennett:

THE COURT: Mr. Bennett, did you commit the crimes for which you've been charged?

THE DEFENDANT: I did, your honor.

THE COURT: Would you tell me in your own words what you did?

THE DEFENDANT: Your Honor, during the period that I served as CEO of Refco, I agreed with other Refco executives to enter into a series of transactions at the end of Refco's financial reporting periods to make it appear as if a receivable due to Refco from Refco Upholdings, Inc. [sic], a related party, was instead due from an independent third-party customer.

The IGHI [sic] receivable was composed of, amongst other things, historical customer losses, bad debts, and expenses that IGHI [sic] had incurred on behalf of Refco.

I, along with other Refco executives, have caused Refco to enter into these transactions in order to conceal the size and nature of the IGHI [sic] receivable. We concealed the receivable from, amongst others, Refco's auditors, Thomas H. Lee Partners, various lenders who, in 2004, participated in Refco's senior secured credit facility, and the issuance of 9 percent senior subordinated notes, and also investors in Refco's common stock.

Among the lenders to whom I knowingly caused the IGHI [sic] receivable to be misrepresented was HSBC Bank, referenced in Count Fifteen of the indictment. I and other Refco executives also used the interstate wires to accomplish these acts within this district, as referenced in Counts Seven through Thirteen. Furthermore, I caused funds obtained from the transaction with Thomas H. Lee Partners, referenced in paragraph 34 of the indictment, to be wired to various parties receiving proceeds from the transaction, as referenced in Counts Sixteen through Twenty, knowing that this money had been unlawfully obtained.

The IGHI [sic] receivable and related party transaction used to conceal it were material information that Refco investors and lenders would have wanted to have known prior to investing in or lending money to Refco. While I believed that I would be able to pay the IGHI [sic] receivable down over time, and did, in fact, ultimately pay [sic] off the receivable balance in its entirety, I knew that obtaining funds from Refco's investors and lenders based on misleading financial statements was also wrong.

I also caused Refco to file documents with the SEC, namely S1, S4, and 10-K that did not disclose the full extent of the IGHI [sic] receivable or the transactions used to conceal it; and, thus, were false and misleading with respect to material facts. I knew that failing to disclose these facts in public filings and in connection with Refco's sale and registration of Refco's notes and common stock was wrong, and I deeply regret having done so.

Your Honor, I take full responsibility for my actions . . . .

2/15 Tr. at 16-20.

61. At the conclusion of the February 15, 2008 hearing, the Court found that Bennett pleaded guilty knowingly and voluntarily:

THE COURT: Mr. Bennett, I'm satisfied that you understand the nature of the charges against you and the consequences of your plea; and that your plea is made voluntarily and knowingly; and that there is a sufficient factual basis for it. Accordingly, I will accept your plea of guilty . . . .

2/15 Tr. at 20.

62. The S3 Indictment charged Trosten as follows:

Count	Charge
1	Conspiracy to commit securities fraud, wire fraud, to make false filings with the SEC, to make material misstatements to auditors, bank fraud and money laundering
2	Securities fraud in connection with the sale of 9% Senior Subordinated Notes due 2012
7, 8	Wire fraud in connection with certain electronic communications between June 22, 2004 and August 3, 2004 5, 2005, including e-mails to representatives of Thomas H. Lee Partners
15	Bank fraud in connection with the 2004 leverage buyout transaction
17-18	Money laundering in connection with proceeds of the 2004 leverage buyout transaction

63. On February 20, 2008, Trosten pleaded guilty to Counts 1, 2, 7, 15 and 17 against him in the S3 Indictment. A copy of the transcript of the hearing ("2/20 Tr.") is attached hereto as Exhibit H. During the hearing at which Trosten pleaded guilty, the following exchange occurred between the Court and Trosten:



THE COURT: Mr. Trosten, did you commit the offenses that you are pleading guilty to?

THE DEFENDANT: I did, your honor.

THE COURT: Would you tell me, please, what you did?

\* \* \*

THE DEFENDANT: Your Honor, while I was employed at Refco, I agreed with other Refco executives to hide the true nature of Refco's finances on Refco's financial statements. I knew that Refco's financial statements did not accurately reflect Refco's financial condition, because the financial statements did not disclose the full amount that Refco Group Holdings, Inc., a related party, owed to Refco. I understood that the RGHI receivable was underreported because Phillip Bennett, Refco's former chief executive officer, and other Refco executives, including me, were involved in a series of transaction at the end of Refco's financial reporting periods to make it appear as if a receivable was due from third-party customers rather than from a related party.

The RGHI receivable was composed of, amongst other things, historic customer losses, bad debts, and expenses that RGHI incurred on behalf of Refco.

In addition, I participated in a number of transactions that padded or inflated Refco's income. For example, I participated in transactions that shifted expenses off the books of Refco and onto the books of Refco Group Holdings, Inc.

I, along with other Refco executives, agreed to conceal the true size and nature of the RGHI receivable from, amongst others, Refco's auditors, Thomas H. Lee Partners; HSBC, which, in 2004, participated in Refco's senior secured credit facility, as referenced in . . . paragraph 41 and Count Fifteen of the indictment; and investors who purchased bonds that Refco issued in 2004, as referenced in Count Two of the indictment.

I left the company in August 2004, one year before the IPO of Refco. I and other executives used the interstate wires to accomplish these acts within this district, as referenced in Count Seven of the indictment.

Furthermore, I received funds obtained from the transaction with Thomas H. Lee Partners, referenced in paragraph 34 of the indictment, which I knew were proceeds from unlawful activity, as referenced in Count Seventeen.

The RGHI receivable and transactions used to conceal it were material information that Refco investors and lenders would have wanted to know before investing in or lending money to Refco.

I knew that obtaining funds from Refco investors and lenders based on misleading financial information was wrong . . . .

Your Honor, I take full responsibility for my actions and my conduct . . . .

2/20 Tr. at 17-20.

64. At the conclusion of the February 20, 2008 hearing, the Court found that Trosten pleaded guilty knowingly and voluntarily:

THE COURT: Mr. Trosten, I am satisfied that you understand the nature of the charges against you and the consequences of your plea, and that your plea is made voluntarily and knowingly, and that there is a factual basis for your. I will, therefore, accept your plea of guilty.

2/20 Tr. at 20.

65. Meanwhile, on December 19, 2007, Maggio, who is an **Insured** under the Arch Policy, pleaded guilty to a four-count criminal information (the "Maggio Information") charging him with conspiracy, securities fraud and wire fraud. A copy of the Maggio Information is attached hereto as Exhibit I.

66. The Maggio Information, which included nearly all of the same charges of misconduct as the S3Indictment, charged that Maggio was one of Bennett's and Trosten's co-conspirators and that he participated in the conduct underlying the conspiracy. In particular, the Maggio Information charged that Maggio participated in the scheme to hide the RGHI Receivable and to mask the true financial condition of Refco in the several years prior to the August 11, 2005 initial public offering.

67. Based on these and other allegations, the Maggio Information charged Maggio as follows:



Count	Charge
1	Conspiracy to commit securities fraud, wire fraud, to make false filings with the SEC, to make material misstatements to auditors, bank fraud and money laundering
2	Securities fraud in connection with the sale of 9% Senior Subordinated Notes due 2012
3	Securities fraud in connection with the purchase and sale of Refco common stock
4	Wire fraud in connection with the electronic transmission of Refco's Form 10-K on July 19, 2005

68. On December 19, 2007, Maggio pleaded guilty to every count in the Maggio Information. A copy of the transcript of the hearing ("12/19 Tr.") is attached hereto as Exhibit J. During the hearing at which Maggio pleaded guilty, the following exchange occurred between the Court and Maggio:

THE COURT: Did you commit the offenses for which you have been charged, Mr. Maggio?

THE DEFENDANT: Yes.

THE COURT: Tell me what you did.

\* \* \*

THE DEFENDANT: Your Honor, from the late 1990s to October 2005 I was a senior executive at Revko [sic] Ink [sic]. During that period I participated with others to hide the true financial health of Revko [sic] from banks, counter-parties, auditors and investors. With my knowledge and active participation Revko's [sic] substantial losses were covered up as revenues padded [sic] and certain operating expenses were moved off its book. Among the acts I personally engaged in [sic] the signing of loan agreements referencing paragraphs 61-D [loan agreement signed in furtherance of the conspiracy on or about February 20, 2004] and 61-P [loan agreement signed in furtherance of the conspiracy on or about February 23, 2005] of the indictment.

As a result of my conduct and that of my coconspirators false financial statements were issued to obtain debt financing

from the public including 9 percent senior subordinated notes referenced in Count Two of the indictment.

To consummate the sale of 57 percent of Revko [sic] to a group headed by Thomas H. Lee in 2004 and to obtain \$800 million in bank financing the same year and to effect the Revko [sic] initial public offering in 2005. [sic] Moreover, with my knowledge false financial statements were filed with the SEC including form 10K referencing Count Four. The mails and interstate wires were used as part of the fraudulent scheme.

I deeply regret my conduct and the harm that it has caused.

THE COURT: First of all, with respect to all of the activities that you've indicate you participated in it knowingly?

THE DEFENDANT: Yes.

12/19 Tr. at 17-18.

69. At the conclusion of the December 19, 2007 hearing, the Court found that Maggio pleaded guilty knowingly and voluntarily:

Based on defendant's allocution and the recommendations by the government I find that the defendant understands the nature, the charges and consequences of his guilty plea. I also find that the plea is voluntary and that there is a factual basis for the plea. I, therefore, recommend that the plea be accepted . . . .

12/19 Tr. at 20.

70. As demonstrated by each of their guilty pleas to counts that alleged their knowledge of, *inter alia*, efforts to hide the RGHI Receivable from the investing public prior to 2005, Bennett, Trosten and Maggio, as of August 11, 2005, had knowledge of or information concerning acts, errors, omissions, facts, matters or circumstances that might give rise to a Claim under the AWAC Policy or the Arch Policy.

#### **The Underlying Matters**

71. Beginning on October 12, 2005, various lawsuits were filed against the Defendants.

72. A criminal complaint was filed against Bennett (the “Bennett Criminal Complaint”) on October 12, 2005 in *United States v. Bennett*, No. 05-1720 (S.D.N.Y.).

73. The Bennett Criminal Complaint alleged that Bennett knowingly “hid from investors in [Refco’s] August 2005 initial public offering of stock . . . the existence of hundreds of millions of dollars of related party transactions between Refco and a company controlled by Bennett, including causing Refco to file a false and fraudulent S-1 registration statement with the Securities and Exchange Commission.” Bennett Criminal Complaint, ¶ 9. A federal grand jury in New York subsequently returned a criminal “Indictment” against Bennett that was filed on or about November 10, 2005 in *United States v. Bennett, et al.*, No. 05-1192 (S.D.N.Y.). This indictment repeated and expanded upon the allegations in the Bennett Criminal Complaint. On or about October 24, 2006, the grand jury returned a “Superseding Indictment” that named both Bennett and Trosten, and a “Second Superseding Indictment” against them on or about November 16, 2006. On January 16, 2007, a “Third Superseding Indictment” – referred to above as the “Bennett Indictment” – that added Grant as a defendant was filed. On December 19, 2007, the Information against Maggio was filed. Each of these filings alleged, among other things, that the defendant(s) named therein engaged in a scheme to hide the RGHI receivable from the investing public. Collectively, the proceedings initiated by these filings will be referred to herein as the “Criminal Proceedings”.

74. The Bennett Criminal Complaint was tendered to Arch for coverage under the Arch Policy on or about October 13, 2005, and the Indictment, the Superseding Indictment, the Second Superseding Indictment and/or the Third Superseding Indictment were tendered to Arch for coverage under the Arch Policy thereafter.

75. The suits *Mazur et al. v. Refco, Inc., et al.*, No. 05-8626 (S.D.N.Y.), *Frontpoint Fin. Serv., Inc. v. Refco, Inc., et al.*, No. 05-8663 (S.D.N.Y.), *Lieber v. Refco, Inc., et al.*, No. 05-8667 (S.D.N.Y.), *Weiss v. Refco, Inc., et al.*, No. 05-8691 (S.D.N.Y.), *Glaubach v. Refco, Inc., et al.*, No. 05-8692 (S.D.N.Y.), *Gross v. Refco, Inc., et al.*, No. 05-8697 (S.D.N.Y.), *Salamone v. Refco, Inc. et al.*, No. 05-8716 (S.D.N.Y.), *RD Partners LLC v. Refco, Inc., et al.*, No. 05-8737 (S.D.N.Y.), *Wakefield v. Refco, Inc., et al.*, No. 05-8742 (S.D.N.Y.), *Gaugler v. Bennett, et al.*, No. 05-8886 (S.D.N.Y.), *Baker v. Bennett, et al.*, No. 05-8923 (S.D.N.Y.), *Nathanson v. Bennett, et al.*, No. 05-8926 (S.D.N.Y.), *Becker v. Refco, Inc., et al.*, No. 05-8929 (S.D.N.Y.), *Mettupatti v. Bennett, et al.*, No. 05-9048 (S.D.N.Y.), *Weiss v. Bennett, et al.*, No. 05-9126 (S.D.N.Y.), *Weit v. Bennett, et al.*, No. 05-9611 (S.D.N.Y.), *Esses v. Bennett, et al.*, No. 05-9654 (S.D.N.Y.), *City of Pontiac General Employees Retirement System v. Bennett et al.*, No. 05-9941 (S.D.N.Y.), *Gensheimer v. Bennett*, No. 05-10318 (S.D.N.Y.) and *Teachers' Retirement System of the State of Illinois et al. v. Lee, et al.*, No. 05-10403 (S.D.N.Y.) are purported class action securities fraud lawsuits that have been consolidated for pre-trial purposes under Case No. 05-8626 (the "Securities Litigation"). The First Amended Consolidated Class Action Complaint ("FAC") was filed in the consolidated proceedings on May 5, 2006, and the Second Amended Consolidated Class Action Complaint was filed on or about December 3, 2007.

76. The FAC and SAC allege that Refco's initial public offering registration statement and prospectus were materially false and misleading. Specifically, they allege that the registration statement and prospectus failed to disclose the existence of the RGHI Receivable. The FAC further alleges that the Refco financial statements incorporated in Refco's registration statement and prospectus were inaccurate because they failed to disclose the related-party transactions between Refco and RGHI designed to hide the RGHI Receivable. Included among

the defendants named in the SAC are Bennett, Sherer, Sexton, Maggio, Murphy, Silverman, Klejna, Trosten, Grant, O'Kelley, Breitman, Gantcher, Lee, Harkins, Jaeckel, and Schoen.

77. Beginning on or about October 14, 2005, some of the lawsuits comprising the Securities Litigation were tendered to Arch for coverage under the Arch Policy. The FAC was tendered to Arch by letter dated April 28, 2006.

78. The suits *David Fine v. Bennett, et al.*, No. 05-8701 (S.D.N.Y.), and *Mehta v. Bennett, et al.*, No. 05-8748 (S.D.N.Y.), which were shareholder derivative actions (the "Derivative Litigation"), have been dismissed. Bennett, Sherer, Breitman, Gantcher, Harkins, Jaeckel, Lee, O'Kelley, Schoen, Sexton and Murphy, among others, were named as defendants in the Derivative Litigation.

79. The complaints in the Derivative Litigation alleged that Refco's initial public offering registration statement and prospectus were materially false and misleading. Specifically, the complaints alleged that the registration statement and prospectus failed to disclose the existence of the RGHI Receivable. The complaints further alleged that the Refco financial statements incorporated in its registration statement and prospectus were inaccurate because they failed to disclose the related-party transactions between Refco and RGHI that were designed to hide the RGHI Receivable.

80. The *Mehta* complaint was tendered to Arch for coverage under the Arch Policy on or about October 17, 2005.

81. The suit *Bawag P.S.K. Bank v. Refco Inc., et al.*, No. 05-60006 (S.D.N.Y. Bankr.), Adv. No. 05-03161, was filed on November 16, 2005 (the "Bawag Action"). The Bawag Action names Bennett (among others) as a defendant.

82. The complaint in the Bawag Action alleges that the plaintiff was fraudulently induced to loan approximately \$420 million to Bennett on October 10, 2005. The complaint alleges that Bennett failed to disclose that he sought the loan to pay off the RGHI Receivable, a “related-party receivable resulting from the assumption by an entity controlled by Mr. Bennett of certain historical obligations owed by unrelated third parties to Refco [that] likely was impaired and not collectible.” Bawag Action Complaint, § 17. The complaint alleges that Bennett “knew that if BAWAG had been aware of any of the key facts set forth in [Refco’s] October 10, 2005 Press Release, BAWAG would not have made the Loan.” *Id.*, § 30.

83. The Bawag Action was tendered to Arch for coverage under the Arch Policy on or about November 30, 2005.

84. The suit *Thomas H. Lee Equity Fund V, L.P., et al. v. Bennett, et al.*, No. 05-9608 (S.D.N.Y.), was filed on November 14, 2005 (the “THL Funds Action”). The THL Funds Action names Bennett, Grant and Maggio, among others, as defendants.

85. The complaint in the THL Funds Action alleges that in June 2004, the plaintiffs invested approximately \$507 million in Refco. The complaint alleges that despite the plaintiffs’ due diligence efforts, they were unaware that “Bennett intentionally and deliberately engaged in accounting fraud in order to mask a group of largely worthless receivables, bad debts and questionable obligations that, if accurately portrayed on the Company’s financial statements, would have materially reduced Refco’s value.” THL Funds Action Complaint, § 4. Specifically, the complaint alleges that Bennett “nowhere disclosed to the THL Funds that what appeared to be a good and valid receivable from a third-party customer was actually a receivable from RGHI, an entity controlled by Bennett, representing hundreds of million dollars [sic] of customer losses and obligations that would never be repaid to the Company.” *Id.*, § 30. The complaint alleges

that the Refco financial statements provided to the plaintiffs during their due diligence review in 2003 and 2004 were materially false and misleading.

86. The THL Funds Action was tendered to Arch for coverage under the Arch Policy on or about February 13, 2006.

87. The complaint in *Unovalores Ltd. v. Bennett*, No. L1564-05 (Sup. Ct. of New Jersey, Somerset County, Law Division) (the “Unovalores Action”) was filed in New Jersey state court on or about November 1, 2005.

88. The plaintiff in the Unovalores Action, which identifies itself as a Refco Capital account holder, names only Mr. Bennett as a defendant. Plaintiff alleges that it entered into a Repurchase Transaction with Refco on August 31, 2005, in reliance upon representations in Refco's registration statement and other filings concerning Refco's financial health. Those representations were false, according to the complaint, because they concealed massive receivables owed by an entity controlled by Mr. Bennett and at least one-half billion dollars of related party transactions with Mr. Bennett.

89. The Unovalores Action was tendered to Arch for coverage under the Arch Policy on or about February 13, 2006.

90. The complaint in *American Financial International Group v. Refco, Inc., et al.*, No. 05-8988 (S.D.N.Y.) (the “American Financial Action”), was filed in the Southern District of New York on or about October 21, 2005, an amended complaint was filed on April 13, 2006, and a second amended complaint was filed on June 30, 2006.

91. The plaintiff in the American Financial Action identifies itself as a Delaware LLC that traded currencies through an account at Refco F/X Associates, LLC (“RefcoFX”). The suit is a purported class action brought on behalf of all persons who traded currencies through, or had



currency trading accounts with, RefcoFX from August 11, 2005 through the date the amended complaint was filed and who have been damaged. Included among the defendants named in the second amended complaint are Bennett, Sherer, Sexton, Maggio, Trosten, Mutterer and Silverman. The second amended complaint generally alleges the same conduct that is the subject of the Criminal Proceedings and the Securities Litigation.

92. The complaint in the American Financial Action was tendered to Arch for coverage under the Arch Policy on or about October 25, 2005, and the amended complaint was tendered to Arch in May 2006.

93. The complaint in *Global Management Worldwide Limited v. Philip R. Bennett, et al.*, No. 06-0643 (S.D.N.Y.) (the “Global Management Litigation”), was filed in the Southern District of New York on or about January 26, 2006, and a Consolidated Amended Class Action Complaint was filed in September 2006.

94. The plaintiff in the Global Management Litigation identifies itself as a corporation organized under the laws of Nassau, the Bahamas, that was a brokerage customer of Refco Capital Markets, Ltd. (“RCM”). The suit is a purported class action brought on behalf of all brokerage customers of RCM who, at any time from October 17, 2000 to October 17, 2005, entrusted securities to RCM and/or Refco Securities, LLC, directly or indirectly, as custodian and broker for safe-keeping, and continued to hold positions with RCM on October 17, 2005 or thereafter. Plaintiffs generally allege that, during the purported class period, Refco, either directly or through its affiliates, incurred billions of dollars in losses, and tried to hide those losses by surreptitiously selling securities held by RCM in custody for class members. Plaintiffs allege that the financial statements filed by Refco with the SEC during the purported class period were false and misleading because they fraudulently omitted these losses, as well as the scheme



to hide the losses by selling securities stolen from plaintiffs and by building up and hiding the RGHI Receivable. Plaintiffs further allege that they relied upon these false and misleading financial statements and the purported financial integrity of Refco in entrusting securities to RCM.

95. The Global Management Litigation was tendered to Arch for coverage under the Arch Policy on or about March 14, 2006.

96. On or about October 9, 2007, two separate lawsuits were brought by seven investment entities that maintained accounts at RCM: (1) *VR Global Partners L.P., et al. v. Bennett, et al.*, Case No. 07-8686 (S.D.N.Y.) and (2) *Capital Management Select Fund Ltd., et al., v. Bennett, et al.*, Case No. 07-8688 (S.D.N.Y.). The complaints, which were tendered to Arch in October 2007, also allege that Refco insiders schemed to hide the RGHI Receivable, thereby inducing plaintiffs to maintain accounts at RCM, and converted securities owned by plaintiffs to hide losses incurred by Refco. The defendants in the *VR Global* and *Capital Management* litigations include Bennett, Sexton, Maggio, Murphy, Silverman, Trosten, Grant, Lee, Harkins, Jaeckel, Schoen and Outridge. By order dated November 20, 2007, the Global Management Litigation was consolidated for pre-trial purposes with the *VR Global* and *Capital Management* litigations. The consolidated proceedings will be referred to herein as the “RCM Brokerage Customer Securities Litigation.”

97. The complaint in *Kirschner v. Thomas H. Lee Partners, L.P.*, No. 07-7074 (S.D.N.Y) (the “Trustee/THL Partners Litigation”), was filed in the Southern District of New York on or about August 8, 2007.

98. The plaintiff in the Trustee/THL Partners Litigation identifies himself as the trustee of the Refco Litigation Trust (“Trustee”). The individual defendants named in the complaint are

Lee, Harkins, Jaeckel, and Schoen. The Trustee generally alleges that the individual defendants breached fiduciary duties owed to Refco by failing to inform themselves of Refco's true financial state – including efforts to hide the RGHI Receivable – before making business decisions on behalf of Refco.

99. The complaint in the Trustee/THL Partners Litigation was tendered to Arch for coverage under the Arch Policy by letter dated August 16, 2007.

100. The complaint in *Kirschner v. Grant Thornton LLP, et al.*, No. 2007L008818 (Cook County, Ill.) (the "Grant Thornton Litigation"), was filed in Illinois state court on August 21, 2007, and was removed to federal court on or about September 19, 2007 as Case No. 07-cv-05306 (N.D. Ill.).

101. The Grant Thornton Litigation was brought by the Trustee. The individual defendants named in the complaint include Bennett, Maggio, Trosten, and Grant. The Trustee generally alleges that these defendants engaged in a scheme to hide Refco's true financial condition, which included efforts to hide the RGHI Receivable.

102. The complaint in the Grant Thornton Litigation was tendered to Arch for coverage under the Arch Policy by letter dated September 20, 2007.

103. The complaint in *Kirschner v. Agoglia, et al.*, Adv. Pro. No. 07-3060 (Bankr. S.D.N.Y.) (the "Agoglia Litigation"), was filed on or about October 15, 2007.

104. The Agoglia Litigation was brought by the Trustee. The individual defendants named in the complaint are Agoglia, Bennett, Cox, Dittmer, Dhillon, Grady, Grant, Lipoff, Maggio, McCarthy, Murphy, Mutterer, Sexton, and Trosten. The Trustee alleges that Bennett and others "orchestrated a massive financial fraud designed to inflate Refco's financial position artificially until such time as it could be sold", Compl. ¶ 59, a fraud that included the hiding of

the RGHI Receivable. The Trustee seeks to recover transfers made to defendants under avoidance provisions of the Bankruptcy Code and to recover the value of the transfers under a theory of unjust enrichment.

105. The complaint in the Agoglia Litigation was tendered to Arch for coverage under the Arch Policy by letters dated November 8 and November 21, 2007.

106. The complaint in *Kirschner v. Thomas Hackl, et al.*, No. 07-9238 (S.D.N.Y.) (the “Hackl Litigation”), was filed on or about October 15, 2007.

107. The Hackl Litigation was brought by the Trustee. The only individual defendant named in the complaint is Hackl. The Trustee alleges that Bennett, Hackl and others engaged in a scheme to hide the true financial condition of Refco, including efforts to hide the RGHI Receivable, and seeks recovery from Hackl under counts alleging, *inter alia*, breach of fiduciary duty, civil conspiracy, aiding and abetting fraud, and unjust enrichment.

108. The complaint in *Kirschner v. Bennett, et al.*, Case No. 602869 (New York County, New York) (the “Trustee/Bennett Litigation”), was filed in the Supreme Court of New York on or about August 27, 2007, and was removed to federal court on or about September 17, 2007 as Case No. 07- 08165 (S.D.N.Y.).

109. The plaintiff in the Trustee/Bennett Litigation identifies himself as the trustee of the Refco Private Actions Trust and assignee of all claims related to Refco belonging to, among others, certain former Refco customers who maintained accounts at, and entrusted funds to, RCM. The individual defendants named in the complaint are Bennett, Maggio, Trosten and Grant. The complaint alleges, *inter alia*, that these defendants engaged in a scheme to hide Refco’s true financial condition, including engaging in steps to hide the RGHI Receivable. This

conduct allegedly induced RCM customers to entrust assets with RCM, which allegedly were later converted for Refco's use.

110. The Trustee/THL Partners Litigation, the Grant Thornton Litigation, the Trustee/Bennett Litigation, the Agoglia Litigation and the Hackl Litigation are collectively referred to herein as the "Trustee Litigation."

111. Upon information and belief, various governmental and/or regulatory investigations of or proceedings involving one or more of the defendants (the "Regulatory Matters") are ongoing, and one or more of the defendants has sought or may seek coverage for such matters.

112. The proceedings discussed above, including the Criminal Proceedings, the Securities Litigation, the Derivative Litigation, the Bawag Action, the THL Funds Action, the Unovalores Action, the American Financial Action, the RCM Brokerage Customer Securities Litigation, the Trustee Litigation, and the Regulatory Matters, collectively are referenced herein as the "Underlying Matters."

### COUNT I

#### DECLARATORY JUDGMENT THAT THE AWAC PRIOR KNOWLEDGE EXCLUSION BARS COVERAGE FOR THE UNDERLYING MATTERS

113. Arch incorporates by reference each of the allegations of paragraphs 1 through 112 above.

114. As of August 11, 2005, Bennett, Trosten and Maggio possessed knowledge of facts and circumstances that a reasonable person would suppose might afford valid grounds for a claim or that would indicate the probability of any such claim.

115. The Underlying Matters consist of Claims alleging, arising out of, based upon, in consequence of, or attributable to such facts and circumstances.

116. Arch seeks a declaration that based upon the AWAC Prior Knowledge Exclusion, the Arch Policy does not provide coverage for any loss arising out of the Underlying Matters.

## **COUNT II**

### **DECLARATORY JUDGMENT THAT THE ARCH PRIOR KNOWLEDGE OR INFORMATION EXCLUSION BARS COVERAGE FOR THE UNDERLYING MATTERS**

117. Arch incorporates by reference each of the allegations of paragraphs 1 through 116 above.

118. As of August 11, 2005, Bennett, Trosten and Maggio possessed knowledge or information concerning acts, errors, omissions, facts, matters or circumstances that might give rise to a Claim under the Arch Policy.

119. The Underlying Matters consist of Claims arising out of, based upon, or attributable to such acts, errors, omissions, facts, matters or circumstances.

120. Arch seeks a declaration that, based upon the Arch Prior Knowledge or Information Exclusion, the Arch Policy does not provide coverage for any loss arising out of the Underlying Matters.

### **OTHER COVERAGE DEFENSES**

121. Other Arch Policy terms and conditions may ultimately be implicated. Nothing in this Complaint should be construed as a waiver by Arch of any other coverage defenses under the Arch Policy or underlying policies with respect to any claim or potential claim and Arch reserves the right to raise all other terms and conditions of the Arch Policy and underlying policies as defenses to coverage as appropriate.

WHEREFORE, Arch requests that the Court enter a declaration and judgment in its favor:

- A. Declaring that, for the reasons set forth in Count I, the Arch Policy does not provide coverage to any Defendant for any Loss incurred in connection with the Underlying Matters;
- B. Declaring that, for the reasons set forth in Count II, the Arch Policy does not provide coverage to any Defendant for any Loss incurred in connection with the Underlying Matters;
- C. Awarding Arch such additional declaratory and other relief as shall be found to be appropriate under the circumstances; and
- D. Awarding Arch its fees and costs incurred in prosecuting this action.

Dated: February 21, 2008

Respectfully submitted,

VEDDER PRICE P.C.

By: 

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*Attorneys for Plaintiff  
Arch Insurance Company*

# Exhibit F

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

ARCH INSURANCE COMPANY,

Plaintiff,

v.

JOHN D. AGOGLIA, *et al.*,

Defendants.

Index No.: 08/600029

**STIPULATED ORDER FOR ENTRY  
OF JUDGMENT AGAINST  
DEFENDANT PHILLIP R. BENNETT**

Plaintiff Arch Insurance Company ("Arch") and Defendant Phillip R. Bennett ("Bennett"), by and through their undersigned attorneys, jointly file this Stipulated Order for Entry of Judgment against Defendant Phillip R. Bennett.

WHEREAS, Bennett previously sought coverage under the "Arch Policy" for the "Underlying Matters," as those terms are defined in the First Amended Complaint for Declaratory Judgment (the "FAC") filed by Arch on February 22, 2008;

WHEREAS, Bennett has since acknowledged that he is not entitled to any coverage under the Arch Policy for the Underlying Matters or for any action, proceeding, investigation or other matter based upon, arising out of, or involving the facts and circumstances underlying or alleged in any of the Underlying Matters;

NOW, THEREFORE, Arch and Bennett stipulate and agree as follows:

1. Bennett waived formal service of process under C.P.L.R. 308 and acknowledged service and receipt of Arch's Amended Summons and the FAC on February 28, 2008;
2. Bennett stipulates and agrees that the Arch Policy does not afford him any coverage whatsoever for any of the Underlying Matters or for any action, proceeding, investigation or other matter based upon, arising out of, or involving the facts and circumstances underlying or alleged in any of the Underlying Matters;

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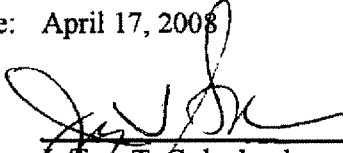
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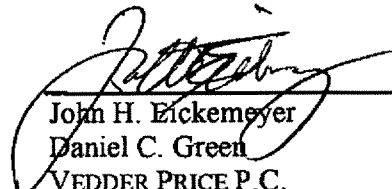


3. Bennett stipulates, agrees and consents to the entry of judgment against him on Counts I and II of the FAC in the form annexed hereto as Exhibit A;
4. Bennett waives any right to appeal the judgment entered against him pursuant to this stipulation;
5. Arch and Bennett stipulate and agree that each party is to bear its or his respective attorneys' fees and costs incurred in connection with this action and any other coverage litigation between the parties.

Date: April 17, 2008

Respectfully submitted,

  
\_\_\_\_\_  
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& PESKOE  
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*Attorneys for Plaintiff Arch Insurance Company*

**SO ORDERED**, this \_\_\_\_ day of \_\_\_\_\_, 2008

By: \_\_\_\_\_

# **EXHIBIT A**

## EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

ARCH INSURANCE COMPANY,

Plaintiff,

V.

JOHN D. AGOGLIA, *et al.*,

**Defendants.**

Index No.: 08/600029

**[PROPOSED] JUDGMENT AGAINST  
DEFENDANT PHILLIP R. BENNETT**

Before the Court is Plaintiff Arch Insurance Company (“Arch”) and Defendant Phillip R. Bennett (“Bennett”)’s Stipulated Order for Entry of Judgment against Defendant Phillip R. Bennett. The Parties’ Stipulated Order having been “so ordered” and entered by the Court, it is hereby adjudged and declared that:

1. Bennett waived formal service of process under C.P.L.R. 308 and acknowledged service and receipt of Arch's Amended Summons and the FAC on February 28, 2008;
2. Pursuant to the Parties' stipulation, Bennett is not entitled to any coverage whatsoever under the Arch Policy for any of the Underlying Matters or for any action, proceeding, investigation or other matter based upon, arising out of, or involving the facts and circumstances underlying or alleged in any of the Underlying Matters;
3. Pursuant to the Parties' stipulation, judgment is entered against Bennett on Count I of the FAC;
4. Pursuant to the Parties' stipulation, judgment is entered against Bennett on Count II of the FAC;
5. Bennett has waived any right to appeal the judgment entered against him; and
6. Each party shall bear its or his respective attorneys' fees and costs incurred in connection with this action and any other coverage litigation between the parties.

By: \_\_\_\_\_  
Clerk

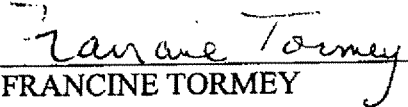


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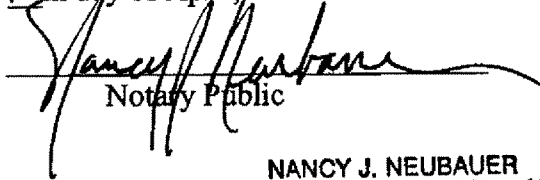
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Sexton, William M. Sherer, Gerald	Ivan Kline Friedman & Wittenstein, P.C. 600 Lexington Avenue New York, NY 10022 (212) 750-8700 <a href="mailto:ikline@friedmanwittenstein.com">ikline@friedmanwittenstein.com</a>
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Trosten, Robert C.	Barbara Moses Morvillo, Abramowitz, Grand, Iason & Silberberg, PC 565 Fifth Avenue New York, NY 10017 (212) 880-9540 <a href="mailto:bmoses@magislaw.com">bmoses@magislaw.com</a>

3. On April 17, 2008, I caused a true copy of the within **STIPULATED ORDER FOR ENTRY OF JUDGMENT AGAINST DEFENDANT PHILLIP R. BENNETT, WITH ANNEXED PROPOSED JUDGMENT AGAINST PHILLIP R. BENNETT** to be served by U.S. mail upon Richard N. Outridge at 24 Pennbrook Drive, Lincoln University, Pennsylvania 19352.

  
FRANCINE TORMEY

Sworn to before me this  
17<sup>th</sup> day of April, 2008

  
Notary Public

NANCY J. NEUBAUER  
Notary Public, State of New York  
No. 01NE5041602  
Qualified in New York County 2011  
Commission Expires April 10, 2011



# Exhibit G

**VEDDERPRICE**

JOHN H. EICKEMEYER  
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FAX: 212-407-7799

CHICAGO • NEW YORK CITY • WASHINGTON, DC • ROSELAND, NJ

April 21, 2008

**BY HAND**

Hon. Helen E. Freedman  
New York County Supreme Court  
Commercial Division  
60 Centre Street  
New York, NY 10007

**Re: Arch Insurance Company v. Agoglia, et al.**  
**Index No. 08/600029**

Dear Justice Freedman:

We represent plaintiff Arch Insurance Company in the above action and enclose a courtesy copy of a Stipulation of Partial Discontinuance With Prejudice as against Defendant Santo C. Maggio ("Maggio"), executed by counsel for plaintiff and Maggio and filed earlier today with the Clerk of the Court.

We ask that the Court review the enclosed and, if it meets with your satisfaction, So Order the Stipulation.

We thank the Court for its consideration in this matter.

Respectfully submitted,

  
John H. Eickemeyer

Enclosure

cc: Cara Tseng Duffield, Esq. (by electronic mail and regular mail)  
Marc E. Rindner, Esq. (by electronic mail and regular mail)  
Daniel J. Standish, Esq. (by electronic mail and regular mail)

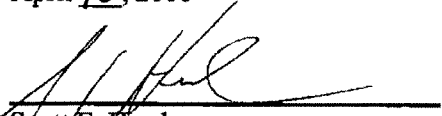
All Defense Counsel (by electronic mail and regular mail)



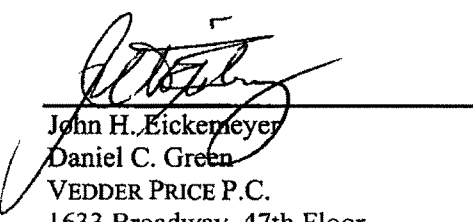
**NOW THEREFORE IT IS HEREBY STIPULATED AND AGREED**, by and between the undersigned, who have been duly authorized by Arch and Maggio to enter into this Stipulation, as follows:

1. Maggio waives formal service of process under C.P.L.R. 308 and acknowledges service and receipt of Arch's Amended Summons and the FAC on March 6, 2008;
2. Maggio agrees that the Arch Policy does not afford him any coverage whatsoever for any of the Underlying Matters or for any other action, proceeding or investigation, including, but not limited to, any matter based upon, arising out of, or involving the facts and circumstances underlying or alleged in any of the Underlying Matters;
3. Maggio agrees that he will not seek coverage under the Arch Policy for any action, proceeding or investigation, including, but not limited to, any matter based upon, arising out of, or involving the facts and circumstances underlying or alleged in any of the Underlying Matters;
4. Arch's causes of action asserted in the FAC are discontinued with prejudice as against Maggio only; and
5. Each party shall bear its or his respective attorneys' fees and costs incurred in connection with this action and any other coverage litigation between the parties.

Dated: April 18, 2008

  
\_\_\_\_\_  
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*Counsel for Defendant Santo C. Maggio*

  
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(202) 719-7000

*Counsel for Plaintiff Arch Insurance Company*

**SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2008**

**By: \_\_\_\_\_**

# Exhibit H

2007 10 05 hrg before Koetl

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

2  
3 AXIS REINSURANCE COMPANY,

3  
4 Plaintiff,

4  
5 v.

M-47 (JGK)

5  
6 PHILLIP R. BENNETT, LEO R.  
6 BREITMAN, NATHAN GANTCHER,  
7 TONE GRANT, DAVID V. HARKINS,  
7 SCOTT L. JAECKEL, DENNIS A.  
8 KLEJNA, THAMAS H. LEE, SANTO  
8 C. MAGGIO, JOSEPH MURPHY,  
9 RONALD L. O'KELLEY, SCOTT A.  
9 SCHOEN, WILLIAM M. SEXTON,  
10 GERARD SHERER, PHILIP  
10 SILVERMAN, ROBERT C. TROSTEN,  
11 AND DOES 1 TO 10,

11  
12 Defendants.

12  
13 -----X

13 New York, N.Y.  
14 October 5, 2007  
14 10:25 a.m.

15  
15 Before:

16  
16 HON. JOHN G. KOELTL,

17  
18 District Judge

19  
20  
21  
22  
23  
24  
25 SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

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APPEARANCES

1  
1  
2 KAUFMAN, BERGEEST & RYAN, LLP  
2 Attorneys for Plaintiff

3 JOAN M. GILBRIDE  
3 ROBERT A. BENJAMIN

4  
5 BAKER & HOSTETLER  
6 Attorneys for Appellee Klejna  
6 HELEN B. KIM

7  
7 FRIEDMAN & WITTENSTEIN, PC  
8 Attorneys for Appellees Sexton and Sherer  
8 IVAN O. KLINE

9  
9 HELLER EHRMAN, LLP

2007 10 05 hrg before Koetl  
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MORVILLO, ABRAMOWITZ, GRAND, IASON, ANELLO & BOHRER, PC  
Attorneys for Robert Trosten  
BARBARA MOSES  
GOLENBOCK, EISEMAN, ASSOR, BELL & PESKOE, LLP  
Attorneys for Phillip Bennett  
JEFFREY T. GOLENBOCK  
WEIL, GOTSHAL & MANGES, LLP  
Attorneys for Director Defendants  
MICHAEL F. WALSH  
SAUL EWING, LLP  
Attorneys for Joseph Murphy  
JOHN J. JEROME  
ZUCKERMAN, SPAEDER, LLP  
Attorneys for Tone Grant  
LAURA E. NEISH

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(212) 805-0300

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(In open court)  
THE DEPUTY CLERK: With regard to the matter of Axis  
Reinsurance, all parties please state who they are for the  
record.  
MS. GILBRIDE: Good morning, your Honor. Joan  
Gilbride, Kaufman, Borgeest & Ryan for Axis Reinsurance  
Company. With me is Robert Benjamin of the same firm.  
THE COURT: Good morning.  
MS. MOSES: Good morning, your Honor. Barbara Moses,  
Morillo, Abramowitz for Robert Trosten, who is one of the  
plaintiffs in the Grant adversary.  
MR. WALSH: Good morning, your Honor. Michael Walsh  
from Weil, Gotshal & Manges. We represent Leo Breitman, Nathan  
Gantcher, David Harkins, Scott Jaeckel, Thomas Lee, Ronald  
O'Kelley, Scott Schoen, often referred to as the Director  
Defendants.  
MR. KLINE: Good morning, your Honor. Ivan Kline from  
Friedman & Wittenstein for William Sexton and Gerard Sherer who  
are two of the what's been labeled as the counterclaimants  
among the officers.  
MS. KIM: Good morning, your Honor. Helen Kim, Baker  
& Hostetler, counsel for Dennis Klejna, who is a counterclaim  
plaintiff in the Axis Adversary proceeding.  
MR. GOLENBOCK: Good morning, your Honor. Jeffrey  
Golenbock of Golenbock, Eiseman for Phillip Bennett in the  
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Grant against Axis proceeding.  
MR. CASHMAN: Good morning, your Honor. Richard  
Cahman of Heller, Ehrman for Philip Silverman. He's one of the  
counterclaim plaintiffs.



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5 MR. JEROME: Good morning, your Honor. John Jerome  
6 for Joseph P. Murphy.  
7 MS. NEISH: Good morning, your Honor. Laura Neish,  
8 Zuckerman, Spaeder for Tone Grant.  
9 THE COURT: Good morning, all. I know lawyers at  
10 various of your firms, but nothing about that affects anything  
11 that I do in the case, and I don't believe that I know any of  
12 you individually, but in any event, nothing about that affects  
13 anything I do in the case.  
14 This is a motion to withdraw the reference. I've read  
15 the papers. I'm prepared to listen to argument.  
16 MS. GILBRIDE: Good morning, your Honor. Joan  
17 Gilbridge for Axis Reinsurance Company. Your Honor, we're here  
18 this morning on a motion to withdraw the reference to  
19 bankruptcy court, and our motion is based upon the interest of  
20 judicial economy, fairness, and efficiency. At an August 30  
21 hearing in the bankruptcy court, the bankruptcy court judge  
22 strongly suggested that one of the parties to the adversary  
23 proceeding at the time make this motion to withdraw the  
24 reference. In fact, he indicated that on the record at least  
25 twice. I believe that the bankruptcy --  
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1 THE COURT: Let me give you a perspective, having read  
2 the papers, and then you can at least speak to that  
3 perspective. It appears to me that the bankruptcy court is  
4 making a distinction between the underlying coverage dispute  
5 and the issue of the advancement of fees. He made that  
6 distinction by dismissing your complaint and granting a  
7 preliminary injunction for the advancement of fees, and he  
8 viewed the advancement of fees as a legal question to be  
9 decided as a matter of law. He's teed up the issue, so to  
10 speak, for the motions for summary judgment to be heard before  
11 him on October 12. There's a new adversary proceeding, but  
12 based on everything that the bankruptcy court has said, one  
13 would expect that at some time the bankruptcy court will not  
14 take jurisdiction over that aspect of the adversary proceeding,  
15 which is the coverage issue, and proceed to decide the  
16 advancement issue; and if he didn't do that, it's that coverage  
17 issue that he considered to be so intertwined with what was at  
18 issue before Judge Lynch that he thought he shouldn't decide,  
19 one would expect that he would do that with a new adversary  
20 proceeding also. If he didn't do that, there could always be a  
21 motion to withdraw the reference with respect to that. But the  
22 motion to withdraw the reference now comes to me about a week  
23 before the bankruptcy judge is going to hear the issue of  
24 summary judgment on the advancement of fees.

25 So, I don't read what the bankruptcy court has said  
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1 inviting the withdrawal of the reference to be an invitation to  
2 withdraw the reference from him on the issue of the advancement  
3 fees which he's plainly divided from the issue of coverage.  
4 MS. GILBRIDE: Your Honor --  
5 THE COURT: That's why I interjected myself when you  
6 got to the point that the bankruptcy court has invited the  
7 motion to withdraw the reference. The bankruptcy court in fact  
8 has said, I am compelled to decide the issue of the motion for  
9 summary judgment on the advancement of fees unless the motion

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10 is withdrawn, and the bankruptcy judge knows that there's a  
11 motion to withdraw the reference.

12 MS. GILBRIDE: I understand. That's the procedural  
13 history of the matter your Honor. Frankly, you know, we  
14 disagree with the bankruptcy court's bifurcation of the issues,  
15 if you will. That's an issue that is going to come before this  
16 court, clearly.

17 THE COURT: Right. And that's an issue with respect  
18 to the varying interpretations of the contract as to when it  
19 says covered costs, what does that mean?

20 MS. GILBRIDE: Right. Our position is that the  
21 question of coverage is the threshold issue that a court has to  
22 look at before it gets to this advancement issue, and that's  
23 the position we've advocated --

24 THE COURT: But that's not what the bankruptcy court  
25 is doing. And if that's wrong, the bankruptcy court will make

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1 that same error when it decides the motion for summary  
2 judgment. That error will then be reviewed by this court. If  
3 error, it will be reversed.

4 MS. GILBRIDE: Your Honor, I believe it's in the  
5 interest of judicial economy that rather than let that error  
6 occur, that a withdrawal be granted now so that the issue and  
7 all of the issues that -- you know, the issues that are pending  
8 before Judge Lynch, the issues that overlap or are duplicated  
9 all be decided in one forum; otherwise, there's the possibility  
10 of conflicting results --

11 THE COURT: What conflicting results? The only issue  
12 that the bankruptcy court has indicated that it's going to be  
13 deciding is the issue of contract interpretation, which you all  
14 told me last time doesn't require any development of the facts.  
15 It does not require any parol evidence. Both sides agree it's  
16 a question of pure contract interpretation.

17 MS. GILBRIDE: Your Honor, just so the record is  
18 clear, our position is that it is a question of pure contract  
19 interpretation, but the insureds are arguing that there's an  
20 ambiguity. Our position on that is if there is an ambiguity,  
21 the court must look at extrinsic evidence. There's been no  
22 opportunity for any discovery in the bankruptcy proceeding.  
23 That's the position we've taken in response to the summary  
24 judgment motion.

25 THE COURT: OK. You can correct me if I'm wrong, but  
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1 I thought that the parties when they appeared before me last  
2 time said that the issue -- but I could be mistaken. I thought  
3 that your position was that the issues with respect to the  
4 interpretation for advancement of costs was an issue strictly  
5 of contract interpretation that could and should be determined  
6 solely on the basis of the contract.

7 MS. GILBRIDE: Your Honor, I mean, certainly our  
8 position of the contract is clear. That's our position. We  
9 are not pushing for summary judgment. That's not our motion,  
10 but all I'm saying is that if the court, the bankruptcy court,  
11 was to perceive an ambiguity, which it appears that's the way  
12 he's going, then that would be the basis for the ruling, that  
13 our position in opposition to the motion is that you need to  
14 look at extrinsic evidence. There's been no extrinsic evidence

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15 introduced, and there's been no time for discovery, and that's  
16 going to become an issue. I have no idea whether or not that's  
17 argument that would be persuasive, but that's certainly our  
18 position, and I don't believe we've taken a inconsistent  
19 position in that regard.

20 THE COURT: Is there only one motion for summary  
21 judgment pending before the magistrate judge -- before the  
22 bankruptcy court?

23 MS. GILBRIDE: There's actually, I think, technically  
24 four motions. There are four groups of defendants, and I don't  
25 want to misspeak. I'm sure lawyers will tell you if I'm wrong,

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1 but I believe they're essentially the same arguments. There's  
2 some slight differences, but they're more or less the same  
3 arguments, but there are four pending motions for summary  
4 judgment.

5 THE COURT: All by the insureds?

6 MS. GILBRIDE: Yes. Yes. We've also made a  
7 cross-motion for summary judgment on a very limited issue with  
8 respect to repayment. Our argument there is that if the court  
9 is to order advancement of defense costs, that based on the  
10 contract if there's a later determination that there is no  
11 coverage, that we should be entitled to repayment.

12 THE COURT: I thought there were cross-motions, that's  
13 why I -- OK.

14 MS. GILBRIDE: We filed cross-motion. That's the only  
15 other cross-motion that there is.

16 In any event, your Honor, we believe that this matter  
17 is properly before the district court. I believe that the  
18 bankruptcy court made that clear. Perhaps we misread what he  
19 was saying. He certainly said that he could bifurcate these  
20 issues, and that he felt that he was constrained to rule upon  
21 this advancement issue if he kept it because it didn't overlap.  
22 Our position is that it overlaps. There's no way that you can  
23 read that policy and not conclude that there's an overlap  
24 between the word coverage and the advancement of defense costs.  
25 So I don't --

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1 THE COURT: You can explain to me -- I'm sure you've  
2 explained this to the bankruptcy judge also -- why the ultimate  
3 questions of whether there are exclusions in the policy or  
4 whether the warranty letter meant that it will eventually be  
5 determined that these defense costs are not payable costs under  
6 the policy is necessarily the same as the issue of whether the  
7 policy gives the insurance company the right at the outset in  
8 deciding whether these are covered defense costs to make that  
9 determination and refuse to pay.

10 The bankruptcy judge doesn't seem to be under any  
11 desire to rule at this point whether any of the exclusions or  
12 the warranty letter mean that ultimately the insurance company  
13 does not have to pay, but the bankruptcy judge says, I will  
14 decide as an initial matter as a question of contract  
15 interpretation whether the insurance company must at least  
16 advance the costs and cannot simply rely upon alleged  
17 exclusions under the policy, which may eventually be found to  
18 be a defense for the insurance company to ultimate payment, and  
19 may require the insureds to repay defense costs. I will

2007 10 05 hrg before Koetl

20 interpret the policy to determine whether under the policy the  
21 insurance company has the obligation to advance the defense  
22 costs in the same way that the prior insurers all advanced  
23 defense costs. And I'm not going to get into the ultimate  
24 merits of the exclusions, but I will simply make the initial  
25 question of advancement, and you say, well, your interpretation

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1 of the policy is wrong.

2 I understand that. And if you prevail on that  
3 question of contract interpretation, then you'll not be  
4 required to advance the costs, but the bankruptcy court will  
5 never reach, as I read what he's doing, the ultimate question  
6 of whether you are ultimately right on the issue that there are  
7 exclusions here that will ultimately be a defense that you'll  
8 never have to pay, and to the extent that you've advanced  
9 costs, they will have to be repaid.

10 But both sides are arguing out to the bankruptcy judge  
11 solely the issue of advancement and whether the interpretation  
12 of the policy gives the insurance company the right at the  
13 outset to define the covered defense costs to include -- to  
14 gives the insurance company the right to say, well, because we  
15 believe there is an exclusion, we don't have to advance.

16 MS. GILBRIDE: Your Honor, that's precisely the reason  
17 why we think the reference should be withdrawn.

18 THE COURT: why?

19 MS. GILBRIDE: Because the two issues are interwoven.  
20 You can't decide -- I think it's clear under New York law that  
21 you can't decide whether there's coverage unless you look at  
22 the insuring agreement and the exclusions. So, the bankruptcy  
23 court needs to do that, and the bankruptcy court has made it  
24 clear that he doesn't think that he can do that because of the  
25 overlap with the matters before the district court.

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1 So, I'm not quite sure how we get to this ruling on  
2 advancement without acknowledging the fact that there's overlap  
3 with the matter that's pending in the district court. Covered  
4 defense costs -- to get to interpret the phrase covered defense  
5 costs, it's clear under New York law that you have to look at  
6 what's covered and what's excluded. And if you start looking  
7 at what's excluded, you have to start looking at the facts that  
8 the bankruptcy court has already determined are overlapping  
9 with what's in the district court.

10 THE COURT: But it's plain, isn't it, that the  
11 bankruptcy court is not going to do that. The bankruptcy court  
12 is not going to -- and you can correct me if I'm wrong -- I'm  
13 just reading the record and seeing what the bankruptcy court is  
14 saying at this point. He hasn't yet decided the motions for  
15 summary judgment. The bankruptcy court isn't going to rule on  
16 the merits on any of the exclusions, in which case he will say  
17 that's error, and that will be a matter of law that will then  
18 be up on appeal, but he's not going to touch the merits of the  
19 exclusions.

20 MS. GILBRIDE: I think you're absolutely right that  
21 based on the record that exists, the extent of briefing and the  
22 record that exists, that appears to be where the bankruptcy  
23 court is going.

24 THE COURT: And then there will be this nice issue of



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25 law of contract interpretation on the issue of advancement  
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1 which will come up on appeal to the district court, and then to  
2 the extent that there is anything left in the bankruptcy court,  
3 the bankruptcy court has indicated, though not yet ruled, I  
4 believe -- you can correct me if I'm wrong -- that whatever  
5 remains of the other adversary proceeding, the bankruptcy has  
6 no reason to believe that the bankruptcy court would hear that  
7 any more than he heard the rest of your case, and then the  
8 issue of the exclusions and coverage will all be before  
9 eventually Judge Lynch.

10 MS. GILBRIDE: Your Honor, it's our position that the  
11 bankruptcy court believes -- it's our position that the  
12 bankruptcy court expressed a clear preference to -- what we  
13 heard -- that he rather not do that, that he doesn't think  
14 that's efficient.

15 THE COURT: which?

16 MS. GILBRIDE: To have this bifurcation of issue. He  
17 obviously said he could do it and he must do it because he had  
18 jurisdiction, but the indication throughout the record was that  
19 the reference should be withdrawn and that the issues of  
20 coverage overlapped clearly with what was before the district  
21 court. I think the bankruptcy court felt constrained to keep  
22 these counterclaims and perhaps didn't realize they were as  
23 broad as they actually are. I think the bankruptcy court  
24 thought they were limited just to advancement. They're not.  
25 When you look at them, they are as broad as our claims were.

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1 They seek a declaration of coverage.  
2 I think you're absolutely right that there is no  
3 question that he will only rule upon this advancement issue.  
4 He has not dismissed the remainder of the counterclaims or  
5 anything extraneous to the advancement issue yet in the  
6 bankruptcy court, but I'm sure that he will.  
7 THE COURT: And if he doesn't, there would be nothing  
8 to prevent a subsequent motion to withdraw the reference if the  
9 bankruptcy judge should be going beyond the issue of  
10 advancement, right? And under the statute, cases can be  
11 withdrawn in whole or in part, so it would be possible to  
12 fashion this either by what the bankruptcy court does or a  
13 subsequent motion to withdraw the reference to assure that  
14 there's no overlap between the action that you've filed now in  
15 the district court and what remains in the bankruptcy court.

16 MS. GILBRIDE: Your Honor, obviously, we've been told  
17 or the argument is that this motion to withdraw the reference  
18 is not timely. I'm sure if there was a subsequent motion,  
19 there would be issues about timeliness raised as well.

20 THE COURT: I think I can make it clear that if I  
21 thought the present motion was untimely because it comes at a  
22 point that suggests that it may have tactical reasons in view  
23 of where it comes in the bankruptcy court proceeding, that  
24 those considerations will not affect the subsequent decision  
25 with respect to a withdrawal of the reference with respect to

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1 whatever remains in the bankruptcy court.  
 2 MS. GILBRIDE: Your Honor, there are remaining issues  
 3 in the district court, obviously. There's our complaint that  
 4 we filed. There is -- inevitably this case, the question of  
 5 coverage is going to be before a court, and we believe strongly  
 6 and think the bankruptcy court steers in this direction that it  
 7 should all be decided by one court, and I think the bankruptcy  
 8 court thought the appropriate court for that was Judge Lynch  
 9 since he had the underlying litigation; that there were  
 10 connections in terms of discovery, settlement, all sorts of  
 11 issues for practical purposes that he thought this coverage  
 12 dispute should be before the district court. I think the  
 13 timely time to do that would be now before there's further  
 14 rulings by the bankruptcy court that will just involve appeals  
 15 and countless more motions and judicial resources being  
 16 utilized when it could all be decided in one place.

17 THE COURT: Are the motions fully briefed before the  
 18 bankruptcy judge?

19 MS. GILBRIDE: The reply briefs have not been filed  
 20 yet. The motion was filed. The oppositions were filed, and  
 21 we're still waiting forth reply briefs.

22 THE COURT: When is the reply brief to be filed?

23 MS. GILBRIDE: The 10th. The hearing is on for the  
 24 12th. So, your Honor, it's our position that in the interest  
 25 of judicial efficiency, the motion to withdraw the reference

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1 should be granted at this time, and for all the reasons set  
 2 forth in our papers. Do you have any questions, your Honor?

3 THE COURT: No. Thank you, you've helped me in terms  
 4 of understanding the case. Thank you.

5 MS. MOSES.

6 MR. WALSH: Thank you, your Honor. I represent  
 7 Mr. Trosten. I'm also going to speak extremely briefly this  
 8 morning on behalf of the other Grant plaintiffs, Mr. Grant and  
 9 Mr. Bennett, and on behalf of the counterclaimants in the Axis  
 10 adversary who are Messrs. Klejna, Murphy, Sexton, Sherer and  
 11 Silverman. And if I've forgotten anyone, I'm sure my  
 12 co-counsels will let me know. Mr. Walsh to my right, I believe  
 13 wishes to also speak on behalf of the Breitman plaintiffs. I  
 14 will be very brief, your Honor.

15 I really just want to touch on two points. The first  
 16 is the bankruptcy court's intent, and the second is the  
 17 possibility of inconsistent results absent a withdrawal of the  
 18 reference.

19 With respect to the bankruptcy court's intent, I think  
 20 your Honor correctly read what Judge Drain had in mind, and I  
 21 think the most relevant page of the transcript below is page 82  
 22 of the August 30 transcript where Axis' counsel actually said  
 23 to Judge Drain, referring to the advancement claims: "You're  
 24 asking us to go to another courthouse to litigate this." And  
 25 the court said no. Judge Drain said, "No, I'm asking you to

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1 tell me whether in fact your client is going to pay or not,"  
 2 and then the court said that it would be happy to determine  
 3 those issues, the advancement issues in the bankruptcy court.  
 4 So I think your Honor got it exactly right.

5 With respect to the possibility of inconsistent

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6 results, I think, given where this case is and how the issues  
7 have been teed up in the bankruptcy court, there's zero  
8 possibility of inconsistent results. And I say that for two  
9 reasons. First, as your Honor just pointed out, Judge Drain  
10 has made it very clear that the issue he intends to decide a  
11 week from today on summary judgment is the narrow contract  
12 interpretation issue of whether under the language of the Axis  
13 policy and the underlying policy Axis has an interim funding  
14 obligation which continues in the face of an unresolved dispute  
15 over ultimate issues of coverage and liability.

16 If Judge Drain were to grant summary judgment for the  
17 insureds on that issue, obviously that could not possibly  
18 conflict or overlap with anything Judge Lynch is doing with  
19 regard to the securities fraud class action.

20 Now, Axis, of course, argues the opposite of that  
21 question. And if Axis should prevail next Friday on the 12th  
22 and if Judge Drain at that point should change his tentative  
23 view and should agree that he has to look at the underlying  
24 fraud issues, the broader coverage issues, in order to  
25 determine the advancement question, he's made it clear that

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1 he's not going to do that. He actually said on page 58 of the  
2 September 11 transcript, that if he were to come out that way,  
3 then there would be an overlap, and at that point this  
4 adversary proceeding, referring to the Grant proceeding, and  
5 the adversary proceeding brought by the counterclaim parties  
6 would be either stayed or dismissed without prejudice pending  
7 the development of those facts in the multisecurities district  
8 litigation.

9 So either way he goes, your Honor, there's zero danger  
10 that Judge Drain is going to make rulings on those coverage  
11 issues, those fraud-related issues, which would pose a danger  
12 with being inconsistent with anything Judge Lynch or Judge  
13 Buchwald has done or is going to do in the district court with  
14 respect to those overlapping fraud issues.

15 So I would submit, your Honor, that looking at the  
16 ultimate questions which are efficiency and uniformity, that  
17 this case actually comes to you in a posture very similar to  
18 two prior withdrawal cases that your Honor decided and that are  
19 cited to you in the papers In Re Ames and In Re Formica, and  
20 that the most efficient thing to do is clearly to let Judge  
21 Drain decide the summary judgment motions that he's got teed up  
22 and ready to go a week from today. Thank you.

23 THE COURT: OK.

24 MR. WALSH: Your Honor, Michael Walsh on behalf of the  
25 Director Defendants. I think just about everything has been

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1 covered. I just want to make two very quick points. Axis'  
2 counsel stated that if there is an issue of ambiguity on the  
3 contract, the court would have to look at evidence that's  
4 outside the contract. I think obviously that will be argued  
5 better in front of the bankruptcy court but argued would be  
6 that ambiguity as a matter of law would be held against the  
7 insurer and in favor of the insureds, so even if there is  
8 ambiguity, I don't think we would go beyond the contract.

9 Second, Axis, I think, may have implied that all of  
10 the directors and officers have these counterclaims that the

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11 court has not disposed of. Certainly, the Director Defendants  
12 are seeking advancement only and are not seeking a  
13 determination in the bankruptcy court of the larger issue of  
14 liability of Axis under the policy.

15 THE COURT: What's your position with respect to the  
16 proceedings before the bankruptcy court and whether they're  
17 core or non-core?

18 MR. KLINE: I think that a strict interpretation of  
19 the contract is not a core proceeding, and I don't think we  
20 were as clear in our papers on that issue as I wish we were,  
21 but I think the point we were making is that in looking at the  
22 core/non-core issue as a factor in withdrawal, the reason to  
23 look at that is for two reasons: One is the issue of the scope  
24 of review, and the other is the issue of the expertise of the  
25 bankruptcy court.

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1 On the scope of review, clearly we're saying that this  
2 is a question of law. So that's review de novo and that does  
3 not help our argument. But in terms of the expertise of the  
4 bankruptcy court and the understanding of what this dispute  
5 means to the rest of the bankruptcy court does fall within the  
6 bankruptcy court's expertise and is a factor -- although we  
7 don't think determinative -- it is a factor that this court  
8 could take into account in making the decision.

9 THE COURT: Thank you for your frankness. The papers  
10 that various insureds submitted were not consistent that the  
11 proceedings as to which withdrawal is sought are in fact  
12 non-core proceedings. In fact, they tried to say that the  
13 bankruptcy judge has found that they are core proceedings, and  
14 it's not clear to me that the bankruptcy court has made such a  
15 finding.

16 MR. KLINE: That may have been our papers, your Honor.  
17 I think all we are trying to say is that the bankruptcy court  
18 referred to provisions of the plan or relief from the stay as  
19 being core, and that those issues were implicated by his  
20 decision, but the contract interpretation itself we did not  
21 mean to imply was core at all.

22 THE COURT: OK. Anyone else? No. I'm prepared to  
23 decide.

24 The defendant, Axis Reinsurance Company ("Axis") has  
25 filed a motion to withdraw the reference from the United States

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1 Bankruptcy Court for the Southern District of New York ("the  
2 Bankruptcy Court") in the consolidated adversary proceedings.  
3 Axis argues that the adversary proceedings are non-core  
4 proceedings, and therefore the reference should be withdrawn in  
5 the interest of judicial economy, particularly in light of the  
6 fact that certain of the insureds have demanded a jury trial.

7 In relevant part, 28 U.S.C. Section 157(d) provides:  
8 "The district court may withdraw, in whole or in part, any case  
9 or proceeding referred under this section, on its own motion or  
10 on timely motion of any party, for cause shown." While the  
11 statute does not define the phrase "for cause," courts have  
12 focused on whether the proceeding is core or non-core as well  
13 as considerations of judicial economy and uniformity in the  
14 administration of bankruptcy law. See, for example, Orion  
15 Pictures Corporation v. Showtime Networks, Inc. (In re Orion



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16 Pictures Corp.), 4 F.3d, 1101, (2d Cir. 1993); Hunnicutt Co. v.  
17 TJX Cos. (In re Ames Department Stores, Inc.), 190 B.R. 157,  
18 162, (S.D.N.Y. 1995).

19 "There is no specific time limit for applications  
20 under 28 U.S.C. Section 157 to withdraw a reference to the  
21 bankruptcy court..." Lone Star Industries, Inc. v. Rankin  
22 County Economic Development District. (In re New York Trap  
23 Rock Corp.), 158 B.R. 574, 577, (S.D.N.Y. 1993). In situations  
24 where timeliness is not governed by a specific timetable, the  
25 court must assess timeliness in the context of the parties'

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1 interactions throughout the course of the litigation in the  
2 bankruptcy court. Id. Therefore, "courts in this Circuit have  
3 defined 'timely' to mean 'as soon as possible after the moving  
4 party has notice of the grounds for withdrawing the  
5 reference.'" Official Committee of Unsecured Creditors of FMI  
6 Forwarding Co., Inc. v. Union Transport Corp. (In re FMI  
7 Forwarding Co., Inc.), No. 04 Civ. 630, 2005 WL 147298, at \*6  
8 (S.D.N.Y. Jan. 24, 2005 (quoting Kentile Floors, Inc. v.  
9 Congoleum Corp. (In re Kentile Floors, Inc.) No. 95 Civ.,  
10 2470, 1995 WL 479512, at \*2. (S.D.N.Y. Aug. 10, 1995))).

11 Based on the particular circumstances at issue, a  
12 delay that is acceptable in one case may not be acceptable in  
13 another case. Id.; compare Connolly v. Bidermann Industries  
14 U.S.A., Inc., No. 95 Civ. 1791, 1996 WL 325575, at \*3 (S.D.N.Y.  
15 June 13, 1996 (finding timely a motion to withdraw reference  
16 filed after a delay of eight months), with In re Kentile  
17 Floors, Inc., at \*2 (finding timely a motion to withdraw  
18 reference filed after a delay of nine months, where the parties  
19 had been in mediation for several months and the motion was  
20 filed promptly after mediation was abandoned). It is clear,  
21 however, that "[d]elay for tactical reason, such as forum  
22 shopping, or which prejudices the opposing party or the  
23 administration of justice, can be grounds for denying" a motion  
24 for withdrawal. In re FMI Forwarding Co., at \*6; see also In  
25 re New York Trap Rock Corp. 158 B.R. at 577.

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1 In this case, the motion is not timely. Axis had  
2 notice of the grounds for withdrawal at the time it filed its  
3 declaratory action in bankruptcy court in May but instead chose  
4 to invoke the bankruptcy court's jurisdiction pursuant to 28  
5 U.S.C. Section 157(c). The motion to withdraw the reference  
6 was filed more than three months after Axis filed its complaint  
7 in the bankruptcy court. In the interim, the parties expended  
8 resources litigating in that forum, and the bankruptcy court  
9 dismissed Axis's complaint, entered preliminary injunctions,  
10 and scheduled a hearing on October 12, 2007 to decide  
11 cross-motions for summary judgment.

12 Axis argues that the motion is timely because it filed  
13 its motion only one week after the bankruptcy court dismissed  
14 its complaint. However, this argument ignores the fact that  
15 Axis waited for more than three months to file its motion and  
16 only sought removal to this court after the adverse decision in  
17 the bankruptcy court on the motion for a preliminary injunction  
18 and on the motion to dismiss. Up to that point, Axis was  
19 willing to allow the bankruptcy court to adjudicate all the  
20 issues in its complaint, including the advancement issue, and

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21 the bankruptcy court expended considerable time and energy in  
22 becoming familiar with the facts and legal issues involved,  
23 particularly on the advancement issue. The motion for  
24 withdrawal of the reference is made shortly before the  
25 bankruptcy court is scheduled to hear oral argument on the

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1 cross-motions for summary judgment on the advancement issue and  
2 appears to be a tactical effort to avoid the bankruptcy court's  
3 decision on that issue, which will be fully reviewable on an  
4 appeal to this court. On the basis of timeliness alone, the  
5 motion for withdrawal of the reference should be denied.

6 Even if the motion was timely, Axis has failed to show  
7 sufficient cause to warrant withdrawal at this time. Under the  
8 framework established by the Court of Appeals for the Second  
9 Circuit, the threshold question with respect to "cause shown"  
10 is whether the case involves a core or non-core proceeding,  
11 "since it is on this issue that questions of efficiency and  
12 uniformity will turn." In re Orion Pictures Corp. 4 F.3d at  
13 1101. After the district court "makes the core/non-core  
14 determination, it should weigh questions of efficient use of  
15 judicial resources, delay and cost to the parties, uniformity  
16 of bankruptcy administration, the prevention of forum shopping  
17 and other related factors," such as the presence of a jury  
18 demand. *Id.*; see also *Kenai Corp. v. National Union Fire*  
19 *Insurance Co. (In re Kenai Corp.)*, 136 B.R. 59, 61, (S.D.N.Y.  
20 1992).

21 To be a core proceeding, the proceeding must "arise  
22 under" Title 11 or "arise in" a bankruptcy case under Title 11.  
23 See *Mt. McKinley Insurance Co. v. Corning Inc.*, 399 F.3d 436,  
24 447-48 (2d Cir. 2005). With respect to claims arising from  
25 contracts, the important factors are whether the contract is

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1 antecedent to the reorganization petition and the degree to  
2 which the proceeding is independent of the reorganization.  
3 *United States Lines, Inc. v. American Steamship Owners Mutual*  
4 *Protection and Indemnity Association, Inc.*, 197, F.3d, 631, 637  
5 (2d Cir. 1999).

6 The insureds now concede that the adversary  
7 proceedings here are non-core proceedings. The causes of  
8 action do not arise under the Bankruptcy Code and would exist  
9 in the absence of a bankruptcy case. The proceedings involve  
10 the interpretation of a pre-petition and insurance contract as  
11 it relates to non-debtors and therefore are sufficiently  
12 removed from the reorganization to be considered non-core.

13 In general, the fact that the proceeding is a non-core  
14 proceeding, weighs in favor of withdrawal because in non-core  
15 proceedings decisions by the bankruptcy court are subject to  
16 de novo review in the district court. In re Orion Pictures  
17 Corp., 4 F.3d at 1101. The fact that a proceeding is non-core,  
18 however, is not determinative because "[i]n the final analysis,  
19 the critical question is efficiency and uniformity." In re FMI  
20 Forwarding Co. at \*5.

21 Therefore, the argument for withdrawal based on the  
22 non-core nature of the proceedings is significantly lessened in  
23 situations where the bankruptcy court has already expended  
24 significant resources on the case and where other factors weigh  
25 strongly against withdrawal. It would be an inefficient use of

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1 judicial resources to withdraw this proceeding from the  
2 bankruptcy court at this time and lose the advantage of the  
3 bankruptcy court's views on the dispute relating to the  
4 advancement of fees.  
5 Axis only sought to remove the reference after the  
6 bankruptcy court dismissed its complaint and granted  
7 preliminary injunctions requiring it to advance defense costs.  
8 Facing a potential permanent junction requiring the advancement  
9 of fees by the bankruptcy court, Axis now moves to withdraw the  
10 reference. In situations where the timing and circumstances of  
11 a motion to withdraw the reference raise a strong inference of  
12 forum shopping, the motion should be denied. See, for example,  
13 In re New York Trap Rock Corp. 158 B.R. at 577 (noting that  
14 withdrawing the reference 11 days after adverse findings by the  
15 bankruptcy court "would reward forum shopping"); In re Kenai  
16 Corp. 136 B.R. at 61.  
17 Axis' argument that its motion is made at the  
18 suggestion of the bankruptcy court and is therefore timely and  
19 not motivated by forum shopping is unpersuasive. First, the  
20 bankruptcy court appears to have been referring to the ultimate  
21 issue of coverage, rather than the discrete issue of  
22 advancement of expenses, when it suggested that it saw the  
23 potential for overlapping issues between Axis' complaint and  
24 the securities class action currently before Judge Lynch.  
25 (Transcript 57-59, dated August 30, 2007, attached as Exhibit 5  
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1 to the declaration of Greg A. Danilow.) In any event, Axis'  
2 proffered explanation does not change the fact that it could  
3 have filed a motion to withdraw the reference at a much earlier  
4 date and only chose to file its motion after the bankruptcy  
5 court had dismissed its complaint and entered the preliminary  
6 injunctions.  
7 Additionally, judicial economy is not served by  
8 withdrawing the reference at this point. The bankruptcy court  
9 has spent considerable time and energy to become familiar with  
10 the parties' arguments with respect to the discrete issue of  
11 Axis' obligation to advance costs under the policy. Moreover,  
12 the bankruptcy court has scheduled a hearing in one week to  
13 consider the motions for summary judgment on the advancement  
14 issue. Even in light of the fact that the decision on the  
15 bankruptcy court will be subject to de novo review on appeal,  
16 it would be an inefficient use of judicial resources for the  
17 Court to withdraw the reference after the bankruptcy court has  
18 become familiar with the case and before it issues its ruling  
19 on the dispute relating to advancement. See, for example, In  
20 re Ames Department Stores, Inc. 190 B.R. at 163-64.  
21 Axis argues that the Court should withdraw the  
22 reference because some of the insureds have requested a jury  
23 trial. However, the bankruptcy court has decided at this point  
24 that the ultimate issue of coverage under the policy is  
25 separate and distinct from the issue remaining before the  
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1 bankruptcy court; namely, whether the terms of the policy  
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 2 require Axis to advance defense costs. If the bankruptcy court  
 3 continues to follow its previous views, that would be an  
 4 additional issue to be decided on appeal. Therefore, the fact  
 5 that a jury demand has been made by certain of the insureds on  
 6 the ultimate issue of coverage does not weigh strongly in favor  
 7 of withdrawal of the reference where the issue in front of the  
 8 bankruptcy court, as the bankruptcy court has previously said,  
 9 is a discrete issue of law which will be decided on  
 10 cross-motions for summary judgment. Of course, all of the  
 11 issues involved in that Bankruptcy Court decision on the  
 12 motions for summary judgment will be fully reviewable de novo  
 13 on appeal. Furthermore, a jury demand is only one factor in  
 14 the analysis, and, in any event, the possibility of a jury  
 15 trial at some later date does not require the court to withdraw  
 16 the reference in situations where judicial economy would be  
 17 better served by current proceedings remaining in the  
 18 bankruptcy court. See, for example, In re Orion Pictures Corp.  
 19 4 F.3d at 1101-02; In re Ames Department Stores, Inc. 190 B.R.  
 20 at 162-63; In re Kenai Corp. 136 B.R. at 61.

21 Indeed, as the Court pointed out in oral argument,  
 22 under the statute, the Court has the authority to withdraw "in  
 23 whole or in part" any case or proceeding referred to the  
 24 bankruptcy court. The bankruptcy court by its dismissal of  
 25 Axis' complaint has made it clear thus far it believes the

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1 underlying coverage dispute should be litigated in the district  
 2 court. If any part of the coverage dispute were to remain in  
 3 the bankruptcy court, that may well be the subject of a motion  
 4 to withdraw the reference for that part of the proceeding at  
 5 some point in the future.

6 Therefore, Axis' motion to withdraw the reference is  
 7 denied without prejudice to refile after the bankruptcy court  
 8 has entered a judgment on the pending motions for summary  
 9 judgment. So ordered.

10 Let me raise another issue with you very quickly:  
 11 This case is filed under M-47, and filings under miscellaneous  
 12 numbers in the clerk's office always produces some issues with  
 13 respect to filing, etc. Are there any outstanding motions or  
 14 orders before me that require a decision that remain unopened  
 15 not correctly filed in the file? Anything else for this court  
 16 to decide? Anything open?

17 MS. GILBRIDE: Your Honor, there's just the appeal  
 18 that was stayed. I filed an appeal that we requested be  
 19 stayed, but other than that, there's nothing else that I'm  
 20 aware of.

21 THE COURT: Because I know that there were motions to  
 22 consolidate the cases before me, and I just want to make sure  
 23 that you've gotten all of the orders that you need and they're  
 24 all properly filed. From time to time there are pro hac vice  
 25 motions that are filed but don't get filed in the correct file

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1 but nothing's open except the appeal that's been stayed. OK.  
 2 Great. Anything else?

3 MS. GILBRIDE: We don't have anything else. Thank  
 4 you, your Honor.

5 THE COURT: Good morning all. Good to see you all.  
 6 (Adjourned)

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